Petition Appendix

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11630

D.C. Docket No. 2:13-cv-00154-KOB

ALAN EUGENE MILLER,

Petitioner - Appellant,

versus

COMMISSIONER, ALABAMA
DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

(August 27, 2020)

Before JORDAN, ROSENBAUM, and LUCK, Circuit Judges.

PER CURIAM:

An Alabama jury found Alan Miller guilty of murdering three men and, following a sentencing hearing, recommended by a vote of 10-2 that he be sentenced to death. The trial court agreed with the jury's recommendation and sentenced Mr. Miller to death. The Alabama Court of Criminal Appeals, after a remand to the trial court, affirmed his conviction and sentence on direct appeal, and later affirmed the trial court's denial of his motion for post-conviction relief. *See Miller v. State*, 913 So. 2d 1148 (Ala. Crim. App. 2004) (*Miller I*); *Miller v. State*, 99 So. 3d 349 (Ala. Crim. App. 2011) (*Miller II*).

Mr. Miller then filed a federal habeas corpus petition. The district court denied relief, and we granted a certificate of appealability on a number of claims. With the benefit of oral argument, and following a review of the record, we affirm the district court's denial of habeas relief.

I

The facts set out below are taken from the opinion of the Alabama Court of Criminal Appeals in *Miller I*, 913 So. 2d at 1154–56.[1]

Mr. Miller worked as a delivery truck driver at Ferguson Enterprises in Pelham, Alabama. Around 7:00 a.m. on August 5, 1999, Johnny Cobb, Ferguson's vice president of operations, was about to enter the company building when he heard

[1] We provide more details later in our discussion of Mr. Miller's ineffective assistance of counsel claim.

some loud noises and what sounded like someone screaming. As he opened the door, Mr. Cobb saw Mr. Miller—armed with a pistol—walk towards him and say, "I'm tired of people starting rumors on me." Mr. Cobb tried to get Mr. Miller to put the pistol down, but Mr. Miller told him to get out of the way. Mr. Cobb ran out the front door and around the side of the building. Mr. Miller then left the building, got into his personal truck, and drove away.

When Mr. Cobb went back into the building, he found Christopher Yancy underneath a desk in the sales office and Lee Holdbrooks on the floor in the hallway. Both men were dead; they had been shot several times and were covered in blood. Mr. Holdbrooks had crawled 20-25 feet in an attempt to escape his assailant, as evidenced by the trail of blood he had left behind. Evidence technicians recovered nine .40-caliber shell casings from the scene. Mr. Cobb, who had called the police, gave officers a description of Mr. Miller's clothing and truck.

While officers conducted their investigation at Ferguson Enterprises, Andy Adderhold and Terry Jarvis were beginning their day at work at Post Airgas in Pelham. Mr. Adderhold noticed Mr. Miller, a former Post Airgas employee, enter the building. Mr. Miller walked toward the sales counter and called out to Mr. Jarvis: "Hey, I hear you've been spreading rumors about me." Mr. Jarvis walked out to the sales counter and replied, "I have not."

Mr. Miller then shot Mr. Jarvis a number of times, and pointed the pistol at Mr. Adderhold, who had crouched behind the counter. Mr. Adderhold begged for his life, and Mr. Miller paused, pointed at a door, and told him to get out. As Mr. Adderhold was leaving, he heard a sound from Mr. Jarvis and looked back. Mr. Miller, however, repeated his order to Mr. Adderhold and told him to "get out—right now." When exiting the building, Mr. Adderhold heard another gunshot. He climbed a fence to a neighboring building and called the police. When the authorities arrived, Mr. Adderhold told them what had happened and provided a description of Mr. Miller.

Officers later stopped Mr. Miller on the highway. In his truck they found a Glock pistol with one round in the chamber and 11 rounds in the ammunition magazine. They also located an empty ammunition magazine on the passenger seat.

At trial, a medical examiner testified that Mr. Holdbrooks was shot six times in the head and chest, with one of the shots to the head being fired at very close range. The medical examiner opined that Mr. Holdbrooks was turning his head and looking up when he was hit with the fatal shot to the head. Mr. Yancy was shot three times. One of the shots caused paralysis and another struck the aorta, resulting in Mr. Yancy dying from loss of blood within 15-20 minutes. Mr. Jarvis was shot five times, with one shot striking his heart. According to the medical examiner, Mr.

Miller was standing over Mr. Jarvis as he shot him in the heart. Mr. Jarvis could have lived anywhere from several minutes to 15 minutes after being shot.

II

The district court's denial of Mr. Miller's habeas corpus petition is subject to plenary review. *See Fults v. GDCP Warden*, 764 F.3d 1311, 1313 (11th Cir. 2014). But because his habeas corpus petition is governed by the provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104–132, 110 Stat. 1214 (1996), Mr. Miller can obtain relief only if the state court's adjudication of a claim was "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court," or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)–(2). AEDPA "imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." *Trepal v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1088, 1107 (11th Cir. 2012) (quoting *Hardy v. Cross*, 565 U.S. 65, 66 (2011)). This standard is "difficult to meet." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

A state court decision is "contrary to" clearly established federal law when "it arrives at an opposite result from the Supreme Court on a question of law, or when it arrives at a different result from the Supreme Court on 'materially

indistinguishable' facts." *Owens v. McLaughlin*, 733 F.3d 320, 324 (11th Cir. 2013) (quoting *Williams v. Taylor*, 529 U.S. 362, 405 (2000)). *See, e.g.*, *Premo v. Moore*, 562 U.S. 115, 128 (2011) ("A state-court adjudication of the performance of counsel under the Sixth Amendment cannot be 'contrary to' *Fulminante*, for *Fulminante*—which involved the admission of an involuntary confession in violation of the Fifth Amendment—says nothing about the *Strickland* standard of effectiveness."). A state court decision cannot be contrary to clearly established federal law "where no Supreme Court precedent is on point." *Washington v. Crosby*, 324 F.3d 1263, 1265 (11th Cir. 2003).

"[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Richter*, 562 U.S. at 101 (emphasis in original and internal quotation marks and citation omitted). As the Supreme Court has put it:

> An unreasonable application [of clearly established federal law] must be objectively unreasonable, not merely wrong; even clear error will not suffice. Rather, as a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.

White v. Woodall, 572 U.S. 415, 419–20 (2014) (internal quotation marks and citations omitted).

With these standards in mind, we address Mr. Miller's claims.

III

Mr. Miller argues that his death sentence is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, 136 S. Ct. 616 (2016), because the jury did not find the facts that made him eligible for the death penalty. Because the Alabama Court of Criminal Appeals reasonably concluded that the jury did find the statutory aggravating circumstance necessary to make Mr. Miller death-eligible, we reject his argument.

Ring, which applies here because it was decided while Mr. Miller's direct appeal was pending in the Court of Criminal Appeals, holds that the Sixth Amendment requires a jury to find an aggravating circumstance that makes a defendant eligible for the death penalty. *See Ring*, 536 U.S. at 609. The only statutory aggravating circumstance submitted to Mr. Miller's jury was that the offense was "especially heinous, atrocious, or cruel compared to other capital offenses." Ala. Code § 13A-5-49(8). The trial court instructed the jury that it could not vote on the death penalty unless it first found beyond a reasonable doubt the existence of at least one aggravating circumstance.

Because the jury recommended a death sentence by a vote of 10-2, the Court of Criminal Appeals found that the jury must have determined the existence of the "heinous, atrocious, or cruel" aggravating circumstance—the only one submitted to it for consideration. *See Miller I*, 913 So. 2d at 1169. Given our general presumption

that juries follow the instructions given to them, *see Penry v. Johnson*, 532 U.S. 782, 799 (2001), and applying AEDPA deference, we cannot say that the factual finding of the Court of Criminal Appeals was unreasonable. *Cf. Nichols v. Heidle*, 725 F.3d 516, 546–49 (6th Cir. 2013) (holding that the finding of the Tennessee Supreme Court—that jurors in a capital case had found the existence of the two aggravating factors submitted to them even though they listed aggravating factors of their own creation on the verdict form—was not an unreasonable finding of fact because the jurors never rejected the two relevant aggravating factors and, when polled, said that they had found the existence of the two aggravating factors).

We also reject Mr. Miller's argument that the remand by the Court of Criminal Appeals demonstrated that the trial court had exclusive authority to make the findings of fact necessary to make Mr. Miller death-eligible. *See* Br. for Appellant at 25–26 (citing and quoting *Miller I*, 913 So. 2d at 1152, 1167). We do so for two reasons.

To begin, Mr. Miller did not raise this argument in the district court until he filed his motion to alter the judgment under Rule 59(e). *See* Reply Br. for Appellant at 3. We review a district court's denial of a Rule 59(e) motion for an abuse of discretion. *See Drago v. Jenne*, 453 F.3d 1301, 1305 (11th Cir. 2006). In denying Mr. Miller's Rule 59(e) motion, the district court did not address the remand argument or whether it had been forfeited. *See generally* D.E. 63. But the district

court's denial of the motion was not an abuse of discretion in any event because a motion to alter a judgment cannot be used to raise new arguments that could have been raised prior to entry of the judgment. *See, e.g.*, *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 957 (11th Cir. 2009).

Mr. Miller's argument also fails on the merits. When the Court of Criminal Appeals remanded to the trial court, it did so to ensure compliance with *Ex parte Kyzer*, 399 So. 2d 330, 334 (Ala. 1981), *abrogated by Ex parte Stephens*, 982 So. 2d 1148 (Ala. 2006), which had held that for capital offenses to be "especially heinous, atrocious or cruel," there must be a more specific finding that they were "conscienceless or pitiless homicides which [were] unnecessarily torturous to the victim." *Miller I*, 913 So. 2d at 1152. The trial court's original order failed to comply with *Kyzer* because it merely recited the "especially heinous, atrocious or cruel" language from the Alabama statute. *See id.* But the sentencing jury had been properly instructed under the *Kyzer* standard. *See Miller II*, 99 So. 3d at 422 (quoting the jury instructions). As explained above, the Court of Criminal Appeals could have reasonably concluded that the jury, by recommending death in a 10-2 vote, found that the offenses were "especially heinous, atrocious or cruel," as well as the more specific requirement necessary under *Kyzer* that the offenses were "conscienceless or pitiless homicides which [were] unnecessarily torturous to the

victim[s]." Because the jury made this finding, Mr. Miller's sentence does not violate *Ring*.

Mr. Miller also makes a broader argument. He contends that under Alabama law at the time, the jury performed only an advisory role in the sentencing process, *see* Ala. Code §§ 13A-5-46(a) & 13A-5-47(e) (2000), and as a result, the trial court had to make the necessary factual finding about the existence of the "heinous, atrocious, or cruel" aggravating circumstance. And that, he says, renders his situation indistinguishable from the Florida system the Supreme Court held unconstitutional in *Hurst*. *See* Br. for Appellant at 23–26 (comparing, in a chart, the similarities between the Florida scheme at issue in *Hurst* and the Alabama scheme under which he was sentenced). *See also Brooks v. Alabama*, 136 S. Ct. 708 (2016) (Sotomayor & Ginsburg, J.J., concurring in the denial of certiorari and Breyer, J., dissenting from the denial of a stay of execution and of certiorari).

We understand Mr. Miller's comparison of the Florida and Alabama schemes. For several reasons, however, we cannot grant Mr. Miller habeas relief.

First, the Supreme Court has upheld the Alabama capital scheme under which Mr. Miller was sentenced, including its use of a purely advisory jury. *See Harris v. Alabama*, 513 U.S. 504, 515 (1995) ("The Constitution permits the trial judge, acting alone, to impose a capital sentence. It is thus not offended when a State further requires the sentencing judge to consider a jury's recommendation and trusts the

judge to give it the proper weight."). Some of the cases *Harris* relied on, such as *Spaziano v. Florida*, 468 U.S. 447, 465 (1984), were overruled in *Hurst*. But as a lower court we must follow an on-point Supreme Court decision even if we believe that later cases have eroded or even abrogated it. *See, e.g.*, *Hohn v. United States*, 524 U.S. 236, 252–53 (1998) (explaining that the Supreme Court's "decisions remain binding precedent until [the Court] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continued vitality"). Given *Harris*, which remains binding precedent, we cannot hold that Alabama's use of an advisory jury to recommend punishment in Mr. Miller's case was unconstitutional.

Second, Mr. Miller's argument relies heavily on the holding and rationale of *Hurst*. But we have held that *Hurst* announced a new rule of constitutional law that is not retroactive on collateral review. *See Knight v. Fla. Dep't of Corr.*, 936 F.3d 1322, 1335–37 (11th Cir. 2019) (applying retroactivity analysis of *Teague v. Lane*, 489 U.S. 288 (1989)). And the Supreme Court has come to the same conclusion. *See McKinney v. Arizona*, 140 S. Ct. 702, 708 (2020). We are therefore unable to apply *Hurst* in Mr. Miller's case. *See id.* Furthermore, because the sentencing jury made the necessary death-eligibility finding, it would not matter whether the trial court had ultimate sentencing authority. *See id.* (holding that, under *Ring*, any states

"'that leave the ultimate life-or-death decision to the judge may continue to do so'") (quoting *Ring*, 536 U.S. at 612 (Scalia, J., concurring)).

IV

Mr. Miller contends that the trial court's jury instructions violated *Caldwell v. Mississippi*, 472 U.S. 320 (1985). We disagree.

The trial court instructed the jury that it had to unanimously find a statutory aggravating circumstance before it could consider the death penalty. It also instructed the jury that its role at sentencing was to make a "recommendation" as to the appropriate punishment.

Caldwell requires that a jury in a capital case be correctly instructed as to its role under state law. "Thus, '[t]o establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law.'" *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (quoting *Dugger v. Adams*, 489 U.S. 401, 407 (1989)). The jury instructions here accurately described the jury's advisory role in Alabama's capital sentencing scheme. Indeed, Mr. Miller does not claim otherwise. His argument, instead, is that the jury instructions violated *Caldwell* because—as a matter of federal constitutional law under *Ring* and its progeny, including *Hurst*—the jury's finding of an aggravating circumstance had to be binding on the trial court.

The argument is an interesting one, but at the end of the day it fails because the jury instructions accurately characterized the jury's role under Alabama law. Mr. Miller cannot use *Caldwell* as an end run around federal retroactivity law to apply *Hurst* to the Alabama capital sentencing scheme and then argue that, because of *Hurst*, the instructions were incorrect. *See Carr v. Schofield*, 364 F.3d 1246, 1258 (11th Cir. 2004) ("We have . . . held that 'references to and descriptions of the jury's sentencing verdict as an advisory one [or] as a recommendation to the judge' . . . do not constitute *Caldwell* violations where they 'accurately characterize the jury's and judge's sentencing roles under [state] law.'") (quoting *Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997)).

V

Mr. Miller asserts that his trial counsel rendered ineffective assistance of counsel, in violation of the Sixth Amendment, when he "sabotaged" the evaluation of his sanity by his medical expert and then withdrew his insanity defense. We are not persuaded.[2]

[2] The district court concluded that because Mr. Miller did not argue on direct appeal that trial counsel was ineffective for failing to provide documents to Dr. Scott, that this part of his ineffective assistance of trial counsel claim was procedurally defaulted. *See* D.E. 53 at 43. Because we are denying relief on the merits, we need not address procedural bar issues. *See* 28 U.S.C. § 2254(b)(2); *Loggins v. Thomas*, 654 F.3d 1204, 1215 (11th Cir. 2011).

A

Through counsel, Mr. Miller initially entered a plea of not guilty by reason of mental disease or defect. Two medical professionals employed by the state, Drs. James Hooper and Harry McClaren—one a psychologist and the other a psychiatrist—evaluated Mr. Miller. Dr. Hooper, who spent only 30 minutes with Mr. Miller and did not conduct any psychological tests, concluded that he did not find any mental illness that would rise to the level of an insanity defense. Dr. McClaren concluded that Mr. Miller gave the impression of suffering from a personality disorder with schizoid and paranoid features, and he could not rule out the possibility of a brief period of dissociation because Mr. Miller reported experiencing a sort of "tunnel vision" near the time of his arrest.

Counsel retained a forensic psychiatrist, Dr. Charles Scott, to evaluate Mr. Miller and determine whether he had been insane at the time of the murders. Dr. Scott requested that he be provided all of Mr. Miller's psychological evaluations, including reports, tests, notes, and raw data. But counsel failed to give Dr. Scott (a) the work file of Dr. Hooper (which included notes of his interview with Mr. Miller shortly after the shooting and which stated that Mr. Miller denied "any memory" of the offense); (b) Dr. McClaren's report and file, which suggested at times that Mr. Miller was not aware of his actions; (c) the recordings of the questioning of Mr. Miller on the day of his arrest, in which he asked, "I'm being charged with

something?"; and (d) a form prepared by counsel shortly after the murders indicating that Mr. Miller was suffering from the "apparent loss of some memory surrounding the events."

Despite not having these materials, Dr. Scott concluded in his preliminary assessment that Mr. Miller suffered from a severe mental illness, and that there was evidence both for and against a determination of insanity. But as things stood, Dr. Scott opined that Mr. Miller did not meet the definition of insanity under Alabama law. In reaching his conclusion, Dr. Scott consulted with Dr. Barbara McDermott, a psychologist who had administered certain tests to Mr. Miller.

At trial, counsel withdrew Mr. Miller's insanity defense, entered a plea of not guilty, and presented no defense during the guilt phase. Counsel later explained that he believed that jurors in Shelby County were "solid" and "hard working" people who "don't believe a lot of hullabaloo about these things they can't see," and they would have regarded the assertion of an insanity defense as "whiny." Counsel told the jury that he was not proud of representing Mr. Miller and that there was "fairly convincing" evidence that he had done what he was charged with. The jury returned a guilty verdict after 20 minutes of deliberation.

In the penalty phase, counsel put on Dr. Scott as Mr. Miller's only witness. Dr. Scott testified that Mr. Miller was mentally ill at the time of the murders because he suffered from a "delusional disorder that substantially impaired his rational

ability," and that the disorder, together with his history as a loner, resulted in his belief that his co-workers were spreading rumors that he was homosexual. Dr. Scott also testified, however, that the mental illness did not rise to the level of insanity under Alabama law because Mr. Miller was able to appreciate the nature and consequences of his actions. *See* Ala. Code § 13A-3-1(a) (defining insanity as when, as a "result of a severe mental disease or defect," the defendant "was unable to appreciate the nature and quality or wrongfulness of his acts"). For example, Mr. Miller returned to shoot Mr. Holdbrooks before driving to another location and shooting Mr. Jarvis.

B

On direct appeal, the Alabama Court of Criminal Appeals stated that counsel's withdrawal of the insanity defense was a "well-reasoned decision," which was a part of a strategy to try to save Mr. Miller's life given the overwhelming evidence of guilt. *See Miller I*, 913 So. 2d at 1159–61. On post-conviction review, the Court of Criminal Appeals concluded that counsel's withdrawal of the insanity defense was a reasonable strategic decision, explaining that all of the medical professionals who had evaluated Mr. Miller had concluded that he did not meet Alabama's definition of insanity at the time of the murders. *See Miller II*, 99 So. 3d at 377.

The district court, applying AEDPA deference, ruled that Mr. Miller had not carried his heavy burden of demonstrating that counsel "performed unreasonably"

in withdrawing the insanity defense. *See* D.E. 53 at 45. First, Dr. Scott had concluded that Mr. Miller did not meet the definition of insanity under Alabama law. Second, Drs. Hooper and McClaren had agreed with Dr. Scott's conclusion. *See id.* at 46.[3]

Mr. Miller argues that the Court of Criminal Appeals and the district court erred with respect to the matter of performance. He points out that insanity was his only defense, and he contends that, in such a circumstance, counsel's decision cannot be presumed to be a reasonable strategic choice. *See, e.g.*, *Profitt v. Waldron*, 831 F.2d 1245, 1248–49 (5th Cir. 1987). He also asserts that, under Alabama law, an expert opinion is not required to send the question of insanity to the jury. *See, e.g.*, *Harkey v. State*, 549 So. 2d 631, 634–35 (Ala. Crim. App. 1989) (concluding that the insanity defense was properly presented to the jury even though counsel did not proffer expert evidence, and quoting *Young v. State*, 428 So. 2d 155, 161 (Ala. Crim. App. 1982), for the general rule that "only slight evidence of insanity at the time of the commission of the crime is required to raise the issue for submission to the jury"). And he cites to *Wheeler v. State*, 659 So. 2d 1032, 1035 (Ala. Crim. App. 1995), in which the Court of Criminal Appeals said that the matter of insanity was for the jury, even though in that case the defense expert testified only that the defendant had

[3] Given its ruling on performance, the district court did not address prejudice. *See* D.E. 53 at 45–46.

major depression with psychotic features and experienced some depersonalization at the time of the murder.

We need not address the performance prong of *Strickland*. Assuming without deciding that counsel's performance as to the insanity defense was constitutionally deficient, Mr. Miller has not demonstrated prejudice.

C

Under *Strickland v. Washington*, 466 U.S. 668, 696 (1984), Mr. Miller has the burden of showing that, but for counsel's errors concerning the insanity defense (i.e., the failure to provide Dr. Scott with all of the information he requested and the withdrawal of the insanity defense), there is a "reasonable probability" of a different outcome, i.e., a reasonable probability that the jury would have found him to be insane under Alabama law at the time of the murders. *See Roberts v. Comm'r, Ala. Dep't of Corr.*, 677 F.3d 1086, 1092 (11th Cir. 2012) (per curiam) ("The appropriate prejudice analysis for this [ineffectiveness] claim would require . . . consider[ing] whether there is a reasonable probability that Roberts' trial would have resulted in his being found not guilty by reason of insanity had his trial counsel properly investigated and presented an insanity defense."); *Weeks v. Jones*, 26 F.3d 1030, 1038 (11th Cir. 1994) ("Weeks would have to establish a reasonable probability that his trial counsel's failure to discover and review his mental history . . . and, thus, to

present an insanity defense, would have resulted in his being found not guilty by reason of insanity.").

The reasonable probability standard does not impose a "more likely than not" burden, but instead requires a defendant to demonstrate a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 693, 694. Nevertheless, the likelihood of a different result must be "substantial, not just conceivable." *Richter*, 562 U.S. at 112.

On post-conviction review, the Alabama Court of Criminal Appeals affirmed the trial court's ruling that Mr. Miller had not shown prejudice from his counsel's alleged errors. It separately analyzed the two purported errors—the failure to provide Dr. Scott with all the information and materials he needed, and the withdrawal of the insanity defense. *See Miller II*, 99 So. 3d at 384–86, 389–90.

With respect to counsel's failure to give Dr. Scott what he had requested, the Court of Criminal Appeals explained that none of the experts who evaluated Mr. Miller—either at trial or in the post-conviction proceedings—concluded that he was legally insane at the time of the murders. For example, Dr. Catherine Boyer, a psychologist retained by Mr. Miller for the post-conviction proceedings, reviewed all of the materials which Mr. Miller says should have been provided to Dr. Scott and also administered several other tests. Although she concluded that Mr. Miller suffered from post-traumatic stress disorder with dissociative features, and believed

that he had experienced a dissociative episode during the shootings that "impaired his ability to appreciate the nature and quality or wrongfulness of his acts," she never testified that he was legally insane at the time of the murders. *See id.* at 385. When asked if she had an opinion about Mr. Miller's sanity, Dr. Boyer said she had none. *See id.* Furthermore, at the post-conviction hearing Dr. Scott did not say that his opinion about Mr. Miller being legally sane had changed since the time of trial and after he had been informed of the previously omitted materials. *See id.*

Turning to counsel's withdrawal of the insanity defense, the Court of Criminal Appeals similarly affirmed the trial court's ruling that Mr. Miller had not shown prejudice. *See id.* at 389–90. First, Dr. Scott testified that Mr. Miller was not unable to appreciate the wrongfulness of his actions, and therefore did not meet the legal definition of insanity under Alabama law. Second, any attempt by counsel to argue lack of intent would have "run contrary to the overwhelming evidence" of Mr. Miller's intent to commit murder (e.g., the number of times Mr. Yancy and Mr. Holdbrooks were shot, the fact that Mr. Miller—after killing those two men—drove to another location to find and shoot Mr. Jarvis multiple times). *See id.* at 389. Third, the failure to introduce mental health evidence during the guilt phase did not prejudice Mr. Miller because Alabama does not recognize a diminished capacity defense. *See id.* at 390.

Applying AEDPA deference, we conclude that the Court of Criminal Appeals' prejudice determination was not unreasonable. Mr. Miller shot and killed two men, and then got in his vehicle and drove to another location where he shot and killed a third man. Given that no medical expert could say that Mr. Miller was legally insane under Alabama law at the time of the murders, the Court of Criminal Appeals did not unreasonably conclude that his counsel's alleged errors with respect to the insanity defense did not prejudice him under *Strickland*.

Our decision in *Roberts* is instructive. In that case the defendant, who had been convicted of capital murder in Alabama and sentenced to death, alleged in part that his trial counsel rendered ineffective assistance by not investigating and pursuing an insanity defense. We declined to address counsel's performance and analyzed the matter of *Strickland* prejudice without AEDPA deference because the Alabama courts had not ruled on prejudice. *See Roberts*, 677 F.3d at 1092. We held that the defendant had failed to show prejudice resulting from his counsel's allegedly deficient performance even though there was evidence that he had a personality disorder, suffered from alcohol abuse and was intoxicated at the time of the murder, may have had memory lapses around the time of the murder, and may not have remembered what happened at the time of the murder. *See id.* at 1092–93. Two facts were critical to our holding on prejudice. First, we understood Alabama law to require a mental disease, and the defendant had no history of a "major debilitating

mental illness." *Id.* at 1093. Second, no medical expert could testify that the defendant was legally insane under Alabama law at the time of the murder. *Id.* There was therefore no basis to conclude that, as a result of a severe mental illness, the defendant could not appreciate the wrongfulness of his actions. *See id.* at 1093–94.

A similar result is appropriate here. As in *Roberts*, no medical professional has ever concluded that Mr. Miller was legally insane under Alabama law at the time of the murders. *See also Smith v. Mullin*, 379 F.3d 919, 935 (10th Cir. 2004) (holding that the defendant, who had been convicted of murdering his wife and stepchildren, was not prejudiced by his counsel's failure to present an insanity defense under Oklahoma law: "Even on the [mental health] evidence available to [counsel], should he have obtained it and presented it, an acquittal [on insanity grounds] was highly unlikely."); *Sandgathe v. Maass*, 314 F.3d 371, 382 (9th Cir. 2002) (holding that counsel's failure to investigate and present an insanity defense did not prejudice the defendant because there was "no evidence anywhere in the record . . . establishing that if counsel had properly investigated, he could have shown that [the defendant's] mental state at the time of the crime met the [Oregon insanity] standard").

VI

Mr. Miller argues that his trial counsel also rendered ineffective assistance of counsel during the penalty phase by failing to present compelling and readily

available mitigating evidence. And he says that his appellate counsel also performed deficiently (at the new trial stage and on appeal) by failing to investigate and preserve trial counsel's errors with respect to mitigating evidence. We conclude that the Alabama Court of Criminal Appeals reasonably determined that Mr. Miller failed to show prejudice resulting from these alleged errors.[4]

A

During the penalty phase, counsel called only one witness—Dr. Scott. As explained earlier, Dr. Scott was a psychiatrist who had been retained to evaluate Mr. Miller's sanity. He testified about Mr. Miller's mental disorder, but he was not a mitigation expert or specialist, and had only obtained limited information about Mr. Miller's background, family life, and employment.

According to Mr. Miller, his counsel could have and should have obtained and presented the following mitigating evidence: (1) Mr. Miller's parents were poor and frequently unemployed, and lived in a rat- and rodent-infested home; (2) Mr. Miller's father used the money the family had to buy drugs; (3) three generations of the Miller family suffered from severe and well-documented mental illnesses (e.g., his paternal great-grandmother suffered from insanity and was hospitalized and his father and uncles had severe mental illnesses); (4) Mr. Miller's father physically

[4] The district court found the ineffective assistance of trial counsel claim to be procedurally barred, but we choose to deny relief on the merits, as AEDPA allows us to do. *See Loggins*, 654 F.3d at 1215.

abused and threatened Mr. Miller on a regular basis, treated him harshly (e.g., calling him names like "little bastard," "retarded," and "moron"), and told him he was a homosexual; (5) Mr. Miller was an excellent employee; (6) Mr. Miller had a close and loving relationship with his siblings, was a great uncle to his nieces and nephews, and provided financial support to them; and (7) Mr. Miller had behaved strangely in the weeks before the shootings. *See* Br. for Appellant at 11–13.

After he was sentenced to death, Mr. Miller (now represented by new appellate counsel) filed a motion for a new trial alleging in part that trial counsel had rendered ineffective assistance. The trial court held an evidentiary hearing, and then summarily denied the motion. *See Miller I*, 913 So. 2d at 1151.

On direct appeal, the Court of Criminal Appeals rejected Mr. Miller's argument that trial counsel had failed to "adequately explore all possible mitigating routes," which left him "unable to make well-informed decisions on the question of mitigation." *Id.* at 1163. It recounted that trial counsel had testified about why he chose to present Mr. Miller's family and social history through Dr. Scott instead of through relatives, and held that it "fail[ed] to see what other mitigating evidence counsel could have offered. Moreover, despite [Mr.] Miller's allegations, he offers

no additional mitigating evidence that counsel did not discover during his investigation or that counsel failed to consider in formulating his trial strategy." *Id.*[5]

On Mr. Miller's post-conviction appeal, the Court of Criminal Appeals again addressed the claims that trial counsel and appellate counsel were ineffective with respect to the investigation and presentation of mitigating evidence at sentencing. It rejected both claims.

The Court of Criminal Appeals affirmed the trial court's conclusions that trial counsel had performed adequately: trial counsel had presented a "competent mitigating case" (including Mr. Miller's mental health and background) through Dr. Scott; "the fact that . . . trial counsel could have presented more mitigation evidence . . . does not establish deficient performance under *Strickland*"; and Mr. Miller had failed to ask trial counsel during the post-conviction hearing why he did not present other witnesses or evidence at the post-conviction hearing (and therefore trial counsel's performance was "presumed to be reasonable"). *See Miller II*, 99 So. 3d at 424.

With respect to prejudice, the Court of Criminal Appeals agreed with the trial court that Mr. Miller had failed to carry his burden. First, Mr. Miller had failed to establish what additional mitigating evidence could have been presented. Second,

[5] At the penalty phase, Dr. Scott testified to the jury about Mr. Miller's father's verbal abuse, his impoverished childhood, and the history of mental illness in his family. *See* D.E. 53 at 104– 07 (citing R. Vol. 8, Tab 22, at 1349, 1350-51, 1362).

the substance of the reports of Dr. Scott and Dr. McDermott were presented during the penalty phase. Third, the trial court found three statutory mitigating circumstances—that Mr. Miller had no significant history of prior criminal activity, that Mr. Miller committed the murders while "under the influence of extreme mental or emotional disturbance," and that Mr. Miller's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law "was substantially impaired"—and Mr. Miller failed to show what additional mitigating circumstances could have been proven. *See id.* at 411, 424. The Court of Criminal Appeals was "confident that there would be no change in the result in this case." *Id.* at 415.

The district court addressed only the matter of prejudice. *See* D.E. 53 at 102. It recounted the additional mitigating evidence Mr. Miller claimed should have been presented, *see id.* at 103–09, and compared that evidence to what was actually presented at the sentencing hearing. Applying AEDPA deference, it determined that a reasonable jurist could conclude that there was no reasonable probability of a different outcome had the additional mitigating evidence been presented. *See id.* at 109. The district court noted that some of Mr. Miller's new evidence was cumulative of the information presented by Dr. Scott and explained that "the value of the additional mitigating evidence . . . is minimal when weighed against the brutal nature" of Mr. Miller's crimes. *See id.* at 111.

B

As explained above, the reasonable probability standard requires a defendant to demonstrate a probability "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. The likelihood of a different result must be "substantial, not just conceivable." *Richter*, 562 U.S. at 112. The question is "whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1326 (11th Cir. 2013) (en banc) (internal quotation marks and citation omitted). In answering this question, we must reweigh the aggravating evidence against the totality of the available mitigating evidence. *See Ferrell v. Hall*, 640 F.3d 1199, 1234 (11th Cir. 2011).

But because we must apply AEDPA deference, we do not analyze the prejudice issue de novo. Instead, we ask whether the prejudice ruling of the Court of Criminal Appeals was reasonable. *See Pittman v. Sec'y, Fla. Dep't of Corr.*, 871 F.3d 1231, 1253 (11th Cir. 2017). Like the district court, we conclude that the Court of Criminal Appeals reasonably held that Mr. Miller failed to show prejudice from his trial counsel's failure to present additional mitigating evidence and his appellate counsel's failure to investigate and preserve the issue of trial counsel's alleged ineffectiveness. *See id.* at 1252–54 (holding that state court reasonably concluded

that defendant—who had committed a violent triple murder with indicia of premeditation—failed to show prejudice resulting from his counsel's alleged failure to present additional mitigating evidence of sexual abuse, drug use, and mental health at sentencing).

Based on the testimony that Dr. Scott provided at the sentencing hearing, the trial court found three statutory mitigating factors. Applying AEDPA deference, the additional mitigating evidence that Mr. Miller presented in post-conviction proceedings (some of which was cumulative) is not strong enough to overcome the three murders he committed and the way in which he carried them out. *See* D.E. 53 at 111–12 (recounting the trial court's factual findings about the murders).

At the first location, Mr. Miller first shot Mr. Yancy in the leg, and the bullet entered his spine and paralyzed him. Mr. Yancy, unable to move, tried to hide from Mr. Miller under a desk but could not reach a cell phone that was inches away from his hand. He must have been afraid he was going to be killed before Mr. Miller fired the final two shots into him. Mr. Miller shot Mr. Holdbrooks several times, and Mr. Holdbrooks crawled down a hallway for about 25 feet before Mr. Miller put the gun to his head and fired the final bullet that killed him. At the second location, Mr. Miller shot Mr. Jarvis five times after he denied spreading rumors about Mr. Miller's sexuality. In the words of the trial court, "[i]t appears all three of [Mr. Miller's] victims suffered for a while not only physically, but psychologically. In each

instance, there appeared to have been hope for life while they were hurting, only to have their fate sealed by a final shot, execution style." *Id.* at 112 (quoting Rule 32 C.R. Vol. 43, Tab 72 at 1–3). On this record, we cannot say that the Court of Criminal Appeals' prejudice determination was unreasonable. *Cf. Brooks v. Comm'r, Ala. Dep't of Corr.*, 719 F.3d 1292, 1302 (11th Cir. 2013) ("In light of the extensive evidence regarding the horrific nature of the crime, it was reasonable for the Alabama Court of Criminal Appeals to conclude that the penalty phase outcome would not be affected by Brooks's acquaintances' and relatives' impression of him as a nice and polite young man[.]").

VII

The district court's denial of Mr. Miller's habeas corpus petition is affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

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August 27, 2020

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 18-11630-P
Case Style: Alan Eugene Miller v. Commissioner, Alabama DOC
District Court Docket No: 2:13-cv-00154-KOB

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing, are available at www.ca11.uscourts.gov.

Enclosed is a copy of the court's decision filed today in this appeal. Judgment has this day been entered pursuant to FRAP 36. The court's mandate will issue at a later date in accordance with FRAP 41(b).

The time for filing a petition for rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing or for rehearing en banc is timely only if received in the clerk's office within the time specified in the rules. Costs are governed by FRAP 39 and 11th Cir.R. 39-1. The timing, format, and content of a motion for attorney's fees and an objection thereto is governed by 11th Cir. R. 39-2 and 39-3.

Please note that a petition for rehearing en banc must include in the Certificate of Interested Persons a complete list of all persons and entities listed on all certificates previously filed by any party in the appeal. See 11th Cir. R. 26.1-1. In addition, a copy of the opinion sought to be reheard must be included in any petition for rehearing or petition for rehearing en banc. See 11th Cir. R. 35-5(k) and 40-1 .

Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation for time spent on the appeal no later than 60 days after either issuance of mandate or filing with the U.S. Supreme Court of a petition for writ of certiorari (whichever is later) via the eVoucher system. Please contact the CJA Team at (404) 335-6167 or cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

For questions concerning the issuance of the decision of this court, please call the number referenced in the signature block below. For all other questions, please call David L. Thomas at (404) 335-6171.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David L. Thomas
Phone #: 404-335-6151

OPIN-1 Ntc of Issuance of Opinion

FILED
2017 Mar-29 AM 11:30
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ALAN EUGENE MILLER,	)	
	)	
Petitioner,	)	
	)	
v.	)	**CIVIL ACTION NO.**
	)	**2:13-00154-KOB**
JEFFERSON S. DUNN,	)	
Commissioner of the Alabama	)	
Department of Corrections,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

This case is again before the court upon the petitioner Alan Eugene Miller's "Petition for Writ of Habeas Corpus By Prisoner In State Custody Under Sentence of Death," pursuant to 28 U.S.C. § 2254.[1] (Doc. 1). Miller alleges that he was denied effective assistance of counsel both at trial and on appeal, and that his death sentence violates the United States Constitution.

[1] The court's original Memorandum Opinion and Final Judgment, entered August 4, 2015, were withdrawn on September 4, 2015, upon Miller's unopposed motion to supplement the record with exhibits from the Rule 32 proceedings in state court, that were not previously made part of the record in this case. This Memorandum Opinion considers those exhibits. Additionally, it addresses the arguments made by the parties subsequent to the original Memorandum Opinion, pertaining to *Hardwick v. Sec'y, Fla. Dep't of Corr.*, 803 F.3d 541 (11th Cir. 2015); *Hurst v. Florida*, 136 S. Ct. 616 (2016); *Daniel v. Comm'r, Ala. Dep't of Corr.*, 822 F.3d 1248, 1255 (11th Cir. 2016); and *In re Bohannon v. State*, No. 1150640, 2016 WL 5817692, at *5 (Ala. Sept. 30, 2016).

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I. THE OFFENSE CONDUCT

The Alabama Court of Criminal Appeals provided the following summary of the evidence of the offense when it considered Miller's direct appeal. The state has adopted this summary for the purpose of answering Miller's petition. (Doc. 15, at 2).

> The evidence presented at trial tended to establish the following. Around 7:00 a.m. on August 5, 1999, Johnny Cobb arrived at his place of employment, Ferguson Enterprises in Pelham. Cobb, the vice president of operations, recognized several other vehicles in the company's parking lot as belonging to sales manager Scott Yancy and delivery truck drivers Lee Holdbrooks and Alan Miller. As Cobb prepared to enter the building, he heard some loud noises and what sounded like someone screaming. Cobb opened the front door and saw Miller walking toward him. Miller, who was armed with a pistol, pointed the pistol in the general direction of Cobb and stated, "I'm tired of people starting rumors on me." Cobb tried to get Miller to put the pistol down, but Miller told him to get out of his way. Cobb ran out the front door and around the side of the building. Miller then left the building, walked over to his personal truck, and drove away.
>
> After Cobb heard Miller drive away, he went back inside the building. He saw Christopher Yancy on the floor in the sales office and Lee Holdbrooks on the floor in the hallway. Both men were covered in blood and showed no signs of life. They appeared to have been shot multiple times. Cobb used his cellular telephone to summon the police, who were dispatched at 7:04 a.m. Minutes later, officers from the Pelham Police Department arrived to investigate the shooting.
>
> After Cobb told the police officers what he had seen, the officers entered the building. There, they found the body of Christopher Yancy slumped to the floor, underneath a desk in the sales office. Lee Holdbrooks was lying face down in the hallway at the end of a bloody "crawl trail," indicating that he had crawled 20-25 feet down the hall in an attempt to escape his assailant. The officers secured the scene and

waited for evidence technicians to arrive. Cobb provided a description of Miller's clothing and the truck he was driving. This description was transmitted to police headquarters and sent out over the police radio by the police dispatcher. Evidence technicians recovered nine .40-caliber shell casings from the scene.

While officers began investigating the crime scene at Ferguson Enterprises, Andy Adderhold was arriving for work at Post Airgas in Pelham. Adderhold, the manager of the Pelham store, arrived shortly after 7:00 a.m. Adderhold entered the office and talked with Terry Jarvis, another employee, for a few minutes before continuing to another office. At this point, Adderhold noticed Miller—a former employee of Post Airgas—enter the building. Miller walked toward the sales counter and called out to Jarvis: "Hey, I hear you've been spreading rumors about me." As Jarvis walked out of his office and walked into the area behind the sales counter, he replied, "I have not." Miller fired several shots at Jarvis. As Jarvis fell to the floor, Adderhold crouched behind the counter. Miller then walked behind the counter and pointed the pistol at Adderhold's face. Adderhold begged for his life. Miller paused, then pointed to a door, and told him to get out. Adderhold stood up and, as he began to move toward the door, heard a sound from Jarvis. When Adderhold paused and looked back at Jarvis, Miller repeated his order to "get out-right now." At this Adderhold left the sales area. As Adderhold was leaving the building, he heard another gunshot. Adderhold proceeded out of the back of the building, climbed over a fence to a neighboring building, where he used someone's cellular telephone to summon the police.

The second emergency call came in to the Pelham Police Department at approximately 7:18 a.m. Upon arrival, officers entered the building housing Post Airgas and found Jarvis's body on the floor behind the sales counter. Jarvis had sustained several gunshot wounds to his chest and abdomen. After securing the scene, officers recovered six .40-caliber spent shell casings from the floor of the sales area. Adderhold was interviewed, and he recounted the events surrounding Jarvis's murder.

After a description of Miller and the vehicle he was driving was transmitted over the police radio, law-enforcement officers combed the area in search of Miller. Pelham police sergeant Stuart Davidson and his partner were patrolling Interstate 65 near Alabaster when word of the second shooting was broadcast. Upon hearing that Miller was still in the vicinity of Pelham, Davidson exited I-65 to head back to Pelham. As Davidson turned back toward Pelham, he spotted a truck matching the description of Miller's entering I-65 from Highway 31 in Alabaster. Davidson radioed for backup and followed the truck south on I-65 into Chilton County. Once additional officers were in place as backup, law-enforcement officers initiated a traffic stop of the truck. Following the traffic stop, officers were able to positively identify the driver as Miller. Miller was ordered to get out of the truck, and he was forcibly subdued and handcuffed after resisting efforts to place him in custody. After placing Miller in the back of a patrol car, officers secured his truck. Inside the truck, they found a Glock brand pistol lying on the driver's seat. The pistol contained 1 round in the chamber and 11 rounds in the magazine. An empty Glock ammunition magazine was found on the passenger seat. Miller was transported to the Pelham Police Department where he was charged with murder.

At trial, the State called various witnesses who testified concerning the events of August 5, 1999. Evidence was also introduced regarding ballistics testing of the spent shell casings found at both murder sites; the testing matched all of the shell casings to the .40-caliber Glock pistol found on Miller. Dr. Stephen Pustilnik, a state medical examiner with the Alabama Department of Forensic Sciences, testified that the cause of death for all three victims was multiple gunshot wounds. Lee Holdbrooks - whose body was found in the hallway - was shot six times in the head and chest; although several of the wounds were nonfatal, one of the head wounds was fired at very close range and would have been immediately incapacitating and fatal. Based on "blood splatter" analysis and the positioning of the body, Dr. Pustilnik concluded that Holdbrooks was turning his head and looking up when the fatal shot was fired.

> Scott Yancy was shot three times; one of the shots struck the aorta, which would have caused Yancy to "bleed out" within 15-20 minutes, while another wound would have caused paralysis. At the time he was shot, Yancy was underneath a metal desk; there was no indication that he ever moved from this position.
>
> Terry Jarvis was shot five times; one of the shots struck Jarvis's liver and another his heart. Jarvis had already fallen to the floor when he was shot in the heart. Based on "blood splatter" analysis, Dr. Pustilnik concluded that Miller was standing over Jarvis as he shot him in the heart. Despite the nature of this wound, Jarvis could have lived anywhere from several minutes to 15 minutes after being shot.

Miller v. State, 913 So. 2d 1148, 1154-56 (Ala. Crim. App. 2004).

II. TRIAL: GUILT AND PENALTY PHASES

In August, 1999, a Shelby County Grand Jury indicted Miller on one count of capital murder under § 13A-5-40(a)(10) of the Code of Alabama, for murdering two or more persons by one act or pursuant to one scheme or course of conduct. (C.R. Vol. 1, Tab 1, at 18).[2] The Circuit Court of Shelby County appointed Mickey L. Johnson and Rodger D. Bass to represent Miller. (C.R. Vol. 1, Tab 1, at 1).

On August 17, 1999, Miller entered pleas of not guilty and not guilty by reason of mental disease or defect. (C.R. Vol. 1, Tab 1, at 1). Accordingly, the court ordered Miller to undergo a mental evaluation. (C.R. Vol. 1, Tab 1, at 19). Miller was

[2] References to the record appear as follows: "C.R" refers to the Miller's trial and Motion for New Trial. "R." refers to Miller's direct appeal. "Rule 32 C.R." refers to the Rule 32 collateral proceedings. "Rule 32 R." refers to the Appeal of the Rule 32 collateral proceedings.

evaluated by Dr. James Hooper at the Taylor Hardin Secure Medical Facility on October 4, 1999, for the purpose of assessing his competence to stand trial and his mental state at the time of the murders. *Miller v. State*, 99 So. 3d at 379. Dr. Hooper reportedly spent approximately thirty minutes with Miller in conducting his evaluation (Rule 32 C.R. Vol. 33, Tab 59, at 681), ultimately concluding that Miller was competent to stand trial and that he did not meet the legal standard for insanity. (*See* Doc. 47-33 at 47-52). The state subsequently hired Dr. Harry McClaren, a forensic psychologist, to evaluate Miller's competency to stand trial and his mental state at the time of the shooting. *Miller*, 99 So. 3d at 379. In late 1999, Dr. McClaren conducted a three-day evaluation of Miller, concluding that he was competent to stand trial and that he was sane at the time of the crime. (*See* Doc. 47-25 at 29-33; Rule 32 C.R. Vol. 33, Tab 59, at 774-82).

On March 16, 2000, Miller's trial counsel applied for funds to hire an expert psychiatrist and an expert psychologist to assist in Miller's defense. (C.R. Vol. 1, Tab 1, at 50-55). On April 4, 2000, the trial court granted Miller's request. (*Id.* at 57). Trial counsel hired Dr. Charles Scott, a forensic psychiatrist from the University of California Davis, to evaluate Miller's sanity at the time of the shooting. (Doc. 47-31 at 1; R. Vol. 8, Tab 22, at 1343). Dr. Scott began his three-day psychiatric evaluation of Miller in late April of 2000, approximately eight-and-a-half months after the

August 5, 1999 shooting. (*See* Doc. 47-31, at 1-23; R. Vol. 8, Tab 22, at 1347). In conducting his evaluation, Dr. Scott consulted with Dr. Barbara McDermott, a psychologist, who conducted psychological testing on Miller and prepared a report dated May 11, 2000. (Doc. 47-31, at 1-2; R. Vol. 8, Tab 22, at 1346; Rule 32 C.R. Vol. 31, Tab 59, at 316-18). Dr. Scott asked Dr. McDermott to conduct psychological tests focusing on assessing Miller's IQ and to assist Dr. Scott in determining whether Miller was malingering when recollecting what happened on the day of the shooting. (Doc. 47-28, at 15; R. Vol. 8, Tab 22, at 1357-58; Rule 32 C.R. Vol. 31, Tab 59, at 317)[3]. Based on the information provided to Dr. Scott and his independent evaluation of Miller, Dr. Scott determined that Miller was not insane at the time of the shooting. (Doc. 47-31, at 23; R. Vol. 8, Tab 22, at 1383-88; Rule 32 C.R. Vol. 31, Tab 59, at 380).

After receiving the report of Dr. Scott's evaluation, Miller withdrew his insanity plea and entered a simple plea of not guilty on May 24, 2000, less than a month before the scheduled trial. (C.R. Vol. 1, Tab 6, at 66-67). On June 1, 2000, less than two weeks before trial, the court granted Mr. Bass's oral motion to withdraw

[3] Dr. McDermott concluded that Miller was not malingering, but was, at the time, suffering from a "Major Depressive Disorder," and throughout his life, had suffered from a "Schizoid Personality Disorder." (Doc. 47-28 at 16).

as defense counsel, and appointed Ronnie Blackwood as co-counsel to Mr. Johnson.[4] (C.R. Vol. 1, Tab 1, at 4).

Miller's trial began as scheduled on June 12, 2000. (C.R. Vol. 1, Tab 7, at 69). Five days later, on June 17, 2000, the jury returned its verdict finding Miller guilty of capital murder as charged in the indictment. (C.R. Vol. 1, Tab 1, at 4, 73). Immediately after the jury returned its guilty verdict, the trial transitioned to the penalty phase. The only aggravating circumstance argued by the state was that the capital offense was "especially heinous, atrocious, or cruel compared to other capital offenses." Ala. Code. § 13A-5-49(8). The state relied largely on the evidence presented during the guilt phase and only introduced victim impact testimony from one survivor of each victim. (R. Vol. 8, Tab 21, at 1335-41).

Trial counsel's penalty phase defense was limited to a single witness, Dr. Scott. (R. Vol. 8, Tab 21, at 1341-1403). Dr. Scott's testimony, although addressing Miller's background, focused on establishing the existence of two mitigating factors. First, Dr. Scott testified that despite his conclusion that Miller was sane at the time of the shootings, he believed Miller's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially

[4] Because Mr. Bass withdrew before trial and Mr. Blackwood did not play an active role in the trial, (Rule 32 C.R., Vol. 30, Tab 59, at 111-12), when the court refers to "trial counsel," it refers to Mr. Johnson, unless otherwise specified.

impaired. (R. Vol. 8, Tab 22, at 1383-91). Second, Dr. Scott testified that Miller committed the offense while "under the influence of an extreme mental or emotional disturbance." (R. Vol. 8, Tab 22, at 1391). The state stipulated to the existence of a third mitigating circumstance – that Miller had no significant prior criminal history. (R. Vol. 8, Tab 19, at 1317).

At the end of penalty phase, the jury rendered a 10-2 verdict, with ten jurors voting for the death penalty and two voting for life imprisonment without the possibility of parole. (C.R. Vol. 1, Tab 1, at 73-74). The verdict form only allowed the jurors to indicate the number of votes for the death sentence and the number of votes for a life sentence. (C.R. Vol. 1, Tab 1, at 74-75). The form did not require the jury to indicate the number of jurors who found that the state met its burden of proving an aggravating factor beyond a reasonable doubt, as is now required under *Ex Parte McGriff*, 908 So. 2d 1024, 1039 (Ala. 2004).

III. SENTENCING HEARING

At the July 31, 2000 sentencing hearing, the trial court accepted the jury's recommendation and sentenced Miller to death. (R. Vol 8, Tab 28, at 1453-75). On August 24, 2000, the court issued its sentencing order. (C.R. Vol. 43, Tab 71 at 105-

07).[5] The court determined that three mitigating factors applied in Miller's case: (1) Miller had no significant history of prior criminal activity; (2) Miller committed the crime while "under the influence of extreme mental or emotional disturbance"; and (3) Miller's capacity to "appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired." (*Id*. at 106-07).

Although the only aggravating factor the court found applicable was that the offense was especially heinous, atrocious, or cruel, the court ultimately determined that the defendant "should suffer the punishment of death by electrocution as provided for by law." (*Id*. at 106-07). The court stated that prior to rendering a decision, it examined the presentence report, Dr. Scott's testimony, and the mental evaluation performed, as well as "a non-statutory mitigating circumstance, Defendant's background and family history . . . includ[ing] but . . . not limited to, that as a child, Defendant moved to a number of locations and had an estranged and difficult relationship with his father." (*Id*. at 107).

IV. PROCEDURAL HISTORY

On July 31, 2000, the same day Miller was sentenced to death, the trial court appointed William R. Hill to represent Miller on direct appeal. (C.R. Vol. 1, Tab 1,

[5] The court also issued separate written findings of fact from the evidence and testimony presented during the trial phase and the punishment phase of the trial. (*Id*. at 98-104).

at 90). Later, on August, 2, 2000, the court appointed Haran Lowe as co-counsel for Miller.

A. Motion for a New Trial

Appellate counsel immediately filed a motion for the state to provide a transcript of the trial record because appellate counsel did not witness the trial proceedings and could not "adequately represent the Defendant in his Motion for New Trial or on appeal without a transcription of the trial record." (*Id*. at 91). On August 3, 2000, Miller moved for a new trial based solely on the ground that the verdict was "contrary to law and the weight of the evidence." (*Id*. at 93). On August 25, 2000, Miller filed an amendment to the motion for new trial, outlining twenty-five new grounds for relief. (*Id*. at 95-97). Although appellate counsel did not yet have the trial transcript, ground 24 of the amended motion for new trial alleged that Miller's "due process rights under the United States and Alabama Constitution were denied because his trial counsel was ineffective." (*Id*. at 96).

The hearing on the motion for a new trial was originally scheduled to take place on September 5, 2000. (*Id*. at 108). However, because the trial transcript was not yet available, appellate counsel moved on August 30, 2000, to continue the hearing until after the transcript had been prepared. (*Id*. at 108-09). The court

granted the motion, ultimately holding a two-day hearing on the motion for new trial on December 7, 2000, and January 31, 2001. (C.R. Vol. 1, Tab 1, at 7A-7B).

Miller's trial counsel, Mickey Johnson, was the sole witness on December 7, 2000. (C.R. Vol. 9, Tab 30, at 1-110). On January 31, 2001, Miller elicited testimony from Dr. Bob Wendorf, a clinical psychologist, and Aaron McCall from the Alabama Prison Project. (C.R. Vol. 9, Tab 31, at 111-176). Dr. Wendorf testified regarding the sufficiency of Dr. Scott's testimony during Miller's penalty phase. (*Id*. at 111-56). Mr. McCall testified to the role and availability of mitigation expert assistance in capital cases. (*Id*. at 157-74). After the hearing, the court gave the parties the opportunity to brief the issues discussed at the hearing. (*Id*. at 175-76). On February 13, 2001, Miller filed a brief supporting his motion for new trial, arguing in support of his ineffective assistance of counsel claims. (C.R. Vol. 1, Tab 1, at 114-25). The state filed a reply brief on February 20, 2001. (*Id*. at 126-31). On February 21, 2001, the court summarily denied the motion for new trial without entering a written order or making specific findings of fact regarding the evidence presented during the hearing. (*Id*. at 7B).

B. Direct Appeal

On May 7, 2001, Miller filed his appellate brief in the Alabama Court of Criminal Appeals. (R. Vol. 16, Tab 32). The state filed its brief on June 26, 2001.

(R. Vol. 16, Tab 33). On June 24, 2002, while Miller's direct appeal was pending, the United States Supreme Court issued its decision in *Ring v. Arizona*, 536 U.S. 584 (2002). In *Ring*, the Court held that an Arizona statute allowing a trial judge – acting alone – to determine the presence or absence of an aggravating factor required to impose the death penalty, violated a defendant's Sixth Amendment right to a jury trial. Miller and the state each filed supplemental briefs on August 15, 2002, addressing the impact of *Ring* on Miller's death sentence. (R. Vol. 16, Tabs 34 and 35).

On January 6, 2004, the Alabama Court of Criminal Appeals remanded the case for the trial court to "make specific written findings of fact as to the claims that Miller raised during the hearing on his motion for a new trial," and to "correct its sentencing order and make specific findings of fact regarding the existence of the aggravating circumstance that this offense was especially heinous, atrocious, or cruel when compared to other capital offenses." *Miller v. State*, 913 So. 2d 1148, 1153 (Ala. Crim. App. 2004). The trial court made the required findings and denied the

ineffective assistance of trial counsel claims as meritless.[6] (R. Vol. 43, Tab 72, at 1-23).

On October 29, 2004, on return to remand, the Alabama Court of Criminal Appeals affirmed the trial court's sentencing decision. *Miller*, 913 So. 2d at 1154-71. Miller's application for rehearing (R. Vol. 16, Tab 37) was denied by the Alabama Court of Criminal Appeals on January 7, 2005, and his petition for writ of certiorari (R. Vol. 17, Tab 38) was denied by the Alabama Supreme Court on May 27, 2005. *Miller*, 913 So. 3d 1148. The United States Supreme Court likewise denied certiorari on January 9, 2006. *Miller v. Alabama*, 546 U.S. 1097 (2006).

C. Rule 32 Proceedings in Shelby County Circuit Court

Having exhausted his appeals and obtained a final conviction, Miller obtained new counsel and timely filed a petition under Rule 32 of the Alabama Rules of Criminal Procedure on May 19, 2006. (Rule 32 C.R. Vol. 19, Tab 44, at 1-93). Miller's Rule 32 petition alleged ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and various violations of Miller's constitutional

[6] The trial court addressed each of the eight ineffective assistance of counsel claims Miller alleged individually: that trial counsel (1) admitted Miller's guilt during his guilt phase opening remarks; (2) failed to present an insanity defense during the guilt phase of trial; (3) failed to move for a change of venue; (4) failed to present a defense during the guilt phase of trial; (5) undermined the mitigation case during his penalty phase opening argument; (6) failed to object to victim impact testimony during the penalty phase; (7) failed to adequately investigate and present a penalty phase defense; and (8) failed to challenge the constitutionality of the heinous, atrocious, or cruel aggravating circumstance. (C.R. Vol. 43, Tab 72, at 9-10).

rights. (*Id*.). The state answered Miller's petition on August 18, 2006, arguing that the ineffective assistance of trial counsel claims were barred from review and all of Miller's claims should be rejected on the merits. (Rule 32 C.R. Vol. 19, Tab 45, at 1-34, Rule 32 C.R. Vol. 20, at 35-59). On April 4, 2007, Miller filed his First Amended Petition, responding to some of the state's criticisms of his original petition. (Rule 32 C.R. Vol. 20, Tab 46, at 1-100). On April 18, 2007, the state answered Miller's amended petition and moved to dismiss his claims. (Rule 32 C.R. Vol. 23, Tab 49, at 1-75). On June 25, 2007, the trial court held a hearing on the state's motion to dismiss and some outstanding discovery disputes. (Rule 32. C.R. Vol. 36, Tab 62, at 1-83, Rule 32 C.R. Vol. 37, at 84-104).

On July 31, 2007, the court issued a preliminary ruling on Miller's Rule 32 petition, summarily dismissing his ineffective assistance of trial counsel claim, his claim that his death sentence violated *Ring v. Arizona*, 536 U.S. 584 (2002), and his claim that lethal injection is unconstitutional. (Rule 32 C.R. Vol. 25, Tab 55, at 1327-28). In its order, the trial court also held that Miller's *Brady* and juror misconduct claims had not been pleaded with specificity, and ordered that they be summarily dismissed unless Miller amended the claims with sufficient specificity, within sixty days. (*Id*. at 1328). The parties were allowed to conduct discovery prior to an

evidentiary hearing on Miller's claim of ineffective assistance of appellate counsel. (*Id*. at 1328-29).

The trial court held the evidentiary hearing on February 11-14, 2008, then continued and completed the hearing on August 6, 2008. (Rule 32 C.R. Vols. 29-34, Tab 59, at 1-892; Rule 32 C.R. Vol. 34, Tab 60, at 1-107). Following the hearing, both parties submitted extensive briefing to the court.[7] On May 5, 2009, the trial court issued its final order denying Miller's Amended 32 Petition and summarily dismissing all of Miller's claims with the exception of his claim that he was denied effective assistance of appellate counsel. (Rule 32 C.R. Vols. 28-29, Tab 58, at 1951-2107). As to the ineffective assistance of appellate counsel claim, the court considered the evidence presented at the evidentiary hearing and denied relief on the merits. (*Id*. at 1973-2107).

The court adopted the state's proposed order, which was itself almost a verbatim copy of the state's post Rule 32 hearing response brief. (*Compare* Rule 32 C.R. Vols. 27-28, Tab 57, at 1702-1800 (state's post Rule 32 hearing response brief), *and* Rule 32 C.R. Vol. 35, at 29-185 (state's proposed order), *with* Rule 32 C.R. Vols.

[7] On October 9, 2008, Miller filed a post-hearing brief in support of his First Amended Petition for Relief from Judgment pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. (Rule 32 C.R. Vols. 26-27, Tab 56, at 1520-1695). The state filed its response to Miller's brief on December 8, 2008. (Rule 32 C.R. Vols. 27-28, Tab 57, at 1702-1800). On February 10, 2009, Miller filed his reply brief. (Rule 32 C.R. Vol. 28, Tab 58, at 1895-1950).

28–29, Tab 58, at 1951–2107 (Rule 32 court's Final Judgment)). On May 18, 2009, Miller objected to the court's adoption of the state's proposed final order denying Rule 32 relief. (Rule 32 C.R. Vol. 29, at 2108). On June 4, 2009, the court denied the objection, pointing out that it had authority to adopt a proposed order in whole. (*Id*. at 2117).

Miller appealed both the final order denying Rule 32 relief, and the order denying his objection to adopting the proposed order nearly verbatim. (*Id*. at 2119; Rule 32 R. Vol. 38, Tab 63). The Alabama Court of Criminal Appeals denied his appeal on July 8, 2011. *Miller v. State*, 99 So. 3d 349 (Ala. Crim. App. 2011). Miller subsequently filed an application for rehearing on August 17, 2011 (Rule 32 R. Vol. 40, Tab 66), which was denied by the Alabama Court of Criminal Appeals on October 21, 2011. *Miller*, 99 So. 3d 349.

On November 30, 2011, Miller filed a petition for a writ of certiorari in the Alabama Supreme Court, challenging the appellate court's rejection of his claim regarding the verbatim adoption of the state's proposed order, and his claim that he was denied effective assistance of counsel on direct appeal. (Rule 32 R. Vols. 40-42, Tab 67). After initially granting review on Miller's first claim, the Alabama Supreme Court quashed the writ and denied certiorari on his second claim on June 22, 2012. *Miller*, 99 So. 3d 349; *see also* Rule 32 R. Vol. 43, Tab 77.

V. LEGAL STANDARD

"The habeas statute unambiguously provides that a federal court may issue the writ to a state prisoner 'only on the ground that he is in custody in violation of the Constitution or law or treaties of the United States.'" *Wilson v. Corcoran*, 526 U.S. 1, 5 (2010) (quoting 28 U.S.C. § 2254(a)). As such, this court's review of claims seeking habeas relief is limited to questions of federal constitutional and statutory law. Claims that turn solely upon state law principles fall outside the ambit of this court's authority to provide relief under § 2254. *See Alston v. Dep't of Corr.*, 610 F. 3d 1318, 1326 (11th Cir. 2010).

A. Exhaustion of State Court Remedies: The First Condition Precedent to Federal Habeas Review

A habeas petitioner must present his federal claims to the state court, and exhaust all of the procedures available in the state court system, before seeking relief in federal court. 28 U.S.C. § 2254(b)(1); *Medellin v. Dretke*, 544 U.S. 660, 666 (2005) (holding that a petitioner "can seek federal habeas relief only on claims that have been exhausted in state court"). This requirement serves the purpose of ensuring that state courts are afforded the first opportunity to address federal questions affecting the validity of state court convictions and, if necessary, correct violations

of a state prisoner's federal constitutional rights. *Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998).

In determining whether a claim is properly exhausted, the Supreme Court has stated that "[i]t is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 5-6 (1982) (citations omitted). Instead, "an issue is exhausted if 'the reasonable reader would understand [the] claim's particular legal basis and specific factual foundation' to be the same as it was presented in state court." *Pope v. Sec'y for Dep't Of Corr.*, 680 F.3d 1271, 1286-87 (11th Cir. 2012) (quoting *Kelley v. Sec'y, Dep't of Corr.*, 377 F.3d 1317, 1344-45 (11th Cir. 2004)).

B. The Procedural Default Doctrine: The Second Condition Precedent to Federal Habeas Review

Under the procedural default doctrine, federal review of a habeas petitioner's claim is barred if the last state court to examine the claim states clearly and explicitly that the claim is barred because the petitioner failed to follow state procedural rules, *and* that procedural bar provides an adequate and independent state ground for denying relief. *See Cone v. Bell,* 556 U.S. 449, 465 (2009); *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). The Supreme Court defines an "adequate and independent" state court decision as one that "rests on a state law ground that is

independent of the federal question and *adequate* to support the judgment." *Lee v. Kemna,* 534 U.S. 362, 375 (2002) (quoting *Coleman v. Thompson,* 501 U.S. 722, 729 (1991)).

To be considered "independent," the state court's decision "must rest solidly on state law grounds, and may not be 'intertwined with an interpretation of federal law.'" *Judd v. Haley,* 250 F.3d 1308, 1313 (11th Cir. 2001) (quoting *Card v. Dugger*, 911 F.2d 1494, 1516 (11th Cir. 1990)). To be considered "adequate" to support the state court's judgment, the state procedural rule must be both "firmly established and regularly followed." *Lee v. Kemna,* 534 U.S. at 375 (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984)).

C. Overcoming procedural default: The Cause and Prejudice Analysis

"A federal court may still address the merits of a procedurally defaulted claim if the petitioner can show cause for the default *and* actual prejudice resulting from the alleged constitutional violation." *Ward v. Hall*, 592 F.3d 1144, 1157 (11th Cir. 2010) (citing *Wainwright v. Sykes*, 433 U.S. 72, 84-85 (1977)) (emphasis added). The Supreme Court has recognized that constitutionally ineffective assistance of counsel on direct appeal can constitute "cause" to excuse procedural default. *McCleskey v. Zant*, 499 U.S. 467, 493-94 (1991). However, any attorney error short of

constitutionally ineffective assistance of counsel does not constitute cause, and will not excuse a procedural default. *Id.*

In addition to proving the existence of "cause" for a procedural default, a habeas petitioner must show that he was actually "prejudiced" by the alleged constitutional violation. To show prejudice, a petitioner must show "not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and *substantial* disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis added); *see also McCoy v. Newsome*, 953 F.2d 1252, 1261 (11th Cir. 1992) (*per curiam*). In the context of a defaulted ineffective assistance of trial counsel claim, a petitioner must show not only "cause," but also "that the underlying ineffective assistance of trial counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez v. Ryan*, 132 S. Ct. 1309, 1318-19 (2012).

D. The Statutory Overlay: The Effect of "the Antiterrorism and Effective Death Penalty Act of 1996" on Habeas Review

Miller's case is governed by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). To "prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to

the extent possible under the law," the AEDPA establishes a deferential standard of review of state habeas judgments. *Bell v. Cone*, 535 U.S. 685, 693 (2002).

1. Title 28 U.S.C. § 2254(e)(1)

Section 2254(e)(1) requires district courts to *presume* that a state court's factual determinations are correct, unless the habeas petitioner rebuts the presumption of correctness with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *see also*, *e.g., Fugate v. Head*, 261 F.3d 1206, 1215 (11th Cir. 2001) (observing that § 2254(e)(1) provides "a highly deferential standard of review for factual determinations made by a state court"). The deference that attends state court findings of fact pursuant to § 2254(e)(1) applies to all habeas claims, regardless of their procedural stance. Thus, a presumption of correctness must be afforded to a state court's factual findings, even when the habeas claim is being examined *de novo*. *See Mansfield v. Secretary, Department of Corrections*, 679 F.3d 1301, 1313 (11th Cir. 2012).

2. 28 U.S.C. § 2254(d)

The presumption of correctness also applies to habeas claims that were adjudicated on the merits by the state court and, therefore, are claims subject to the standards of review set out in 28 U.S.C. § 2254(d)(1) or (d)(2). "By its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court,

subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." *Harrington v. Richter*, 562 U.S. 86, 98 (2011).

The provisions of 28 U.S.C. § 2254(d)(1) and (d)(2) provide that when a state court has made a decision on a petitioner's constitutional claim, habeas relief cannot be granted, unless the federal court determines that the state court's adjudication of the claim *either*:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; *or*
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (emphasis added).

The Supreme Court has explained the deferential review of a state court's findings:

> Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams v. Taylor, 529 U.S. 362, 412-13 (2000).

The court should remember that "an *unreasonable* application of federal law is different from an *incorrect* application." *Id.* at 410. A federal habeas court "may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law *erroneously* or *incorrectly*. Rather, that application must also be *unreasonable*." *Id.* at 411 (emphasis added).[8] To demonstrate that a state court's application of clearly established federal law was "objectively unreasonable," the habeas petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law *beyond any possibility for fairminded disagreement*." *Harrington v. Richter*, 562 U.S. at 786-87 (emphasis added).

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[8] The Eleventh Circuit has observed that § 2254(d)(1)'s "unreasonable application" provision is the proper statutory lens for viewing the "run-of-the-mill state-court decision applying the correct legal rule." *Alderman v. Terry*, 468 F.3d 775, 791 (11th Cir. 2006).

> In other words, if the state court identified the correct legal principle but unreasonably applied it to the facts of a petitioner's case, then the federal court should look to § 2254(d)(1)'s "unreasonable application" clause for guidance. "A federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was *objectively* unreasonable."

Id. (quoting *Williams*, 529 U.S. at 409).

E. An Introduction to Ineffective Assistance of Counsel Claims

An introduction to ineffective assistance of counsel claims is included here because of the relationship between such claims – which are governed by a highly deferential standard of constitutional law – and 28 U.S.C. § 2254(d), which is itself an extremely deferential standard of review. Additionally, because the majority of Miller's petition is based on allegations of ineffective assistance of counsel, a general discussion also provides a central reference point.

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court established a two-pronged analysis for determining whether counsel's performance was ineffective. "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." *Id*. at 687. Both parts of the *Strickland* standard must be satisfied: that is, a habeas petitioner bears the burden of proving, by "a preponderance of competent evidence," that the performance of his trial or appellate attorney was *deficient*; *and*, that the deficient performance *prejudiced his defense*. *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000) (*en banc*). Thus, a federal court is not required to address both parts of the *Strickland* standard when the habeas petitioner makes an insufficient showing on either one of the prongs. *See*, *e.g.*, *Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir. 2000) ("Because both parts of the

test must be satisfied to show a violation of the Sixth Amendment, the court need not address the performance prong if the defendant cannot meet the prejudice prong, or vice versa.") (citation to *Strickland* omitted).

1. The performance prong

To satisfy the performance prong, the petitioner must "prove by a preponderance of the evidence that counsel's performance was unreasonable." *Stewart v. Secretary, Department of Corrections*, 476 F.3d 1193, 1209 (11th Cir. 2007) (citing *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000)). The Sixth Amendment does not guarantee a defendant the very best counsel or the most skilled attorney, but only an attorney who performed reasonably well within the broad range of professional norms. *Stewart*, 476 F.3d at 1209. "The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." *White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992). Judicial scrutiny of counsel's performance must be highly deferential, because "[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Strickland*, 466 U.S. at 693.

Indeed, reviewing courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. at 689. "Based on this strong presumption of competent assistance, the petitioner's burden of persuasion is a heavy one: '*petitioner must establish that no competent counsel would have taken the action that his counsel did take*.'" *Stewart*, 476 F.3d at 1209 (quoting *Chandler*, 218 F.3d at 1315) (emphasis added). "Even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds *unless it is shown that no reasonable lawyer*, *in the circumstances*, *would have done so*." *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994) (emphasis added).

2. The prejudice prong

"A petitioner's burden of establishing that his lawyer's deficient performance prejudiced his case is also high." *Van Poyck v. Fla. Dep't of Corr.*, 290 F.3d 1318, 1322 (11th Cir. 2002). "It is not enough for the [petitioner] to show that the errors had some conceivable effect on the outcome of the proceeding." *Id*. (quoting *Strickland*, 466 U.S. at 693) (alteration in original). Instead, to prove prejudice, the habeas petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine

confidence in the outcome." *Strickland*, 466 U.S. at 694. "[W]hen a petitioner challenges a death sentence, 'the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Stewart*, 476 F.3d 1193, 1209 (11th Cir. 2007) (quoting *Strickland*, 466 U.S. at 695). The standard is high, and to satisfy it, a petitioner must present "proof of "'unprofessional errors" so egregious "that the trial was rendered unfair and the verdict rendered suspect."'" *Johnson v. Alabama*, 256 F.3d 1156, 1177 (11th Cir. 2001) (quoting *Eddmonds v. Peters*, 93 F.3d 1307, 1313 (7th Cir. 1996)).

3. Deference accorded state court findings of historical fact, and decisions on the merits, when evaluating ineffective assistance of counsel claims

A reviewing court must give state court findings of historical fact made in the course of evaluating a claim of ineffective assistance of counsel a presumption of correctness under 28 U.S.C. §§ 2254(d)(2) and (e)(1). *See, e.g.*, *Thompson v. Haley*, 255 F.3d 1292, 1297 (11th Cir. 2001). To overcome a state court finding of fact, the petitioner bears a burden of proving contrary facts by clear and convincing evidence.

Additionally, under the AEDPA, a federal habeas court may grant relief based on a claim of ineffective assistance of counsel *only if* the state court determination involved an "unreasonable application" of the *Strickland* standard to the facts of the

case. *Strickland* itself, of course, also requires an assessment of whether counsel's conduct was professionally unreasonable. Those two assessments cannot be conflated into one. *See Harrington v. Richter,* 562 U.S. 86, 101-02. Thus, habeas relief on a claim of ineffective assistance of counsel can be granted with respect to a claim actually decided by the state courts *only if* the habeas court determines that it was "objectively unreasonable" for the state courts to find that counsel's conduct was not "professionally unreasonable." "The standards created by *Strickland* and § 2254(d) are 'highly deferential,' . . . and when the two apply in tandem, review is 'doubly' so." *Id*. at 105.

VI. MILLER'S CLAIMS

Miller's habeas petition alleges the following grounds for relief:

A. Ineffective Assistance of Trial Counsel

i. Failure to Conduct an Adequate Investigation and Failure to Uncover Mitigating Evidence

a. Impoverished and Unstable Upbringing

b. Miller Family History of Mental Illnesses

c. Physical and Emotional Abuse by Miller's Father

d. Exposure to Criminal and Antiosocial Behavior of Family Members

e. Miller's Good Employment History

f. Loving Relationships with Family Members

g. Changes in Miller's Behavior Prior to the Shootings

h. Behavior in Connection with Shootings at Ferguson Enterprises and Post Airgas

ii. Counsel Sabotaged the Work of the Defense Psychiatric Expert, Dr. Scott, then withdrew Miller's Insanity Defense

iii. Failure to Investigate or Develop Mitigating Evidence Following the Withdrawal of the Insanity Defense

iv. Failure to Conduct Adequate Voir Dire

v. Failure to Give an Effective Opening Statement

vi. Deficient Performance During the Presentation of the State's Guilt Phase Evidence

vii. Failure to Present Available Mental Health Evidence During the Guilt Phase

viii. Failure to Object to Improper Statements in the State's Guilt Phase Closing Argument

ix. Effectively Conceding Miller's Guilt During the Guilt Phase Closing Argument

x. Failure to Request Appropriate Guilt Phase Jury Instructions

xi. Failure to Prepare for the Penalty Phase until the Last Minute

xii. Failure to Present an Effective Opening Statement During the Penalty Phase

xiii. Failure to Present Readily Available Mitigating Evidence during the Penalty Phase

iv. Failure to Adequately Argue the Directed Verdict Motion at the End of the Penalty Phase

xv. Ineffective Closing Argument in the Penalty Phase

xvi. Failure to Object to Improper Penalty Phase Jury Instructions

xvii. Failure to Request a Special Verdict Form to Establish that the Jury had Unanimously Found the Sole Alleged Aggravating Circumstance

xviii. Deficient Performance at the Sentencing Hearing

B. Ineffective Assistance of Appellate Counsel

i. Presentation of the Issue of Trial Counsel's Ineffectiveness in the Motion for New Trial, Precluded Miller from Raising the Issue in His Rule 32 Proceedings

ii. Failure to Conduct an Adequate Investigation into the Ineffective Assistance of Counsel at Trial

iii. Failure to Present Evidence at the Hearing on the Motion for New Trial Establishing the Prejudice He Suffered as a Result of Trial Counsel's Ineffectiveness

iv. Deficient Arguments to the Trial Court in Support of the Few Aspects of Trial Counsel Ineffectiveness Counsel Had Identified

v.[9] Failure to Raise and Argue in the Motion for New Trial, the Many Other Ways Trial Counsel Ineffectively Represented Miller

a. Failure to Conduct Adequate Voir Dire (Claim A(iv))

b. Failure to Object to the Admission of Irrelevant and Prejudicial Testimony and Photographs During the Guilt Phase (Claim A(vi))

c. Failure to Effectively Cross-examine Crucial Prosecution Witnesses (Claim A(vi))

d. Failure to Object to Misleading Portions of the State's Guilt Phase Closing Argument (Claim A(viii))

e. Failure to Make an Effective Guilt Phase Closing Argument (Claim A(ix))

f. Failure to Request Appropriate Guilt Phase Jury Instructions (Claim A(x))

[9] The petitioner incorrectly numbered this claim in the petition as claim B(iv).

g. Ineffective Reliance on Dr. Scott as the Sole Mitigation Witness During the Penalty Phase (Claim A(xiii))

h. Failure to Adequately Argue the Directed Verdict Motion at the End of the Penalty Phase (Claim A(xiv))

i. Ineffective Closing Argument in the Penalty Phase (Claim A(xv))

j. Failure to Object to Improper Penalty Phase Jury Instructions (Claim A(xvi))

k. Failure to Request a Special Verdict Form to Establish that the Jury had Unanimously Found the Sole Alleged Aggravating Circumstance (Claim A(xvii))

l. Failure to Offer Evidence, Call Witnesses or Arrange for Anyone to Appear on Miller's Behalf at the Sentencing Hearing (Claim A(xviii))

m. Failure to Argue at the Sentencing Hearing That Pursuant to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), Miller Was Entitled to a New Penalty Phase Trial Before a Jury That Was Not Advised That its Decision with Respect to the Aggravating Factor Was Merely a "Recommendation" (Claim A(xviii))

vi. Ineffective Assistance of Counsel on Appeal to the Alabama Court of Criminal Appeals

C.[10] Miller's Death Sentence Violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

A. MILLER'S INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL CLAIMS

Miller's ineffective assistance of trial counsel claims can be divided into three distinct categories. First, Miller presents claims that were properly exhausted before the Alabama state courts on direct appeal. Second, Miller presents claims that he raised for the first time on collateral appeal. Finally, Miller presents claims that he failed to raise before the state courts on either direct appeal or collateral appeal. This court will address each group of claims in turn.

1. Claims Raised and Exhausted On Direct Appeal

Five of Miller's ineffective assistance of trial counsel claims are properly before this court because he fully exhausted the claims on direct appeal. Miller asserted these claims before the trial court in his motion for new trial. The court conducted a hearing on these claims and subsequently denied all of the claims on the merits. (C.R. Vol. 43, Tab 72). Miller then appealed to the Alabama Court of Criminal Appeals, which upheld the lower court's determination. *Miller*, 913 So. 2d 1148. Finally, Miller sought review of these claims before the Alabama Supreme Court, which denied certiorari. *Id.* Because these claims were fully exhausted on

[10] The petitioner numbered this claim in the petition as claim II.

direct appeal, this court will review the state court's determination under AEDPA deference. *See Wilwording v. Swenson*, 404 U.S. 249, 250 (1971) (recognizing that a petitioner need only present a claim through a single state proceeding to properly exhaust it).

In reviewing the state court's decision, this court is limited to consideration of the record as it was before the state court on direct review. *See Cullen v. Pinholster*, 131 S. Ct. 1388, 1400 (2011) ("If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court."). Miller presented a large amount of evidence at the Rule 32 hearings, and Miller's habeas petition relies heavily on this evidence. Nevertheless, this court must limit its review of Miller's fully exhausted ineffective assistance of *trial* counsel claims to the record before the state court on *direct appeal*.[11]

[11] For Miller to prevail on an ineffective assistance of *appellate* counsel claim, he must demonstrate that his underlying ineffective assistance of trial counsel claims have merit. Because the state court reviewed Miller's ineffective assistance of *appellate* counsel claims on *collateral appeal*, this court will consider the fully developed record that was before the Rule 32 court in reviewing Mr. Miller's ineffective assistance of *appellate* counsel claims. Further, because review of Mr. Miller's ineffective assistance of *appellate* counsel claims will require this court to review his underlying ineffective assistance of *trial* counsel claims, the court will then review Miller's ineffective assistance of *trial* counsel claims in light of the record before the Rule 32 court.

a) Claim A(ii): Miller's Claim That Trial Counsel Was Ineffective For Sabotaging the Work of the Defense Psychiatric Expert and For Withdrawing the Plea of Not Guilty by Reason of Mental Disease or Defect

Within this claim, Miller combines two different instances in which he alleges trial counsel was ineffective. First, Miller alleges that trial counsel was ineffective for failing to provide sufficient evidence to the defense psychiatric expert, Dr. Scott, to allow Dr. Scott to determine whether Miller was sane at the time of the shootings. (Doc. 1, at 48-66). Second, Miller alleges that trial counsel was ineffective for subsequently withdrawing Miller's insanity defense. (*Id*. at 66).

On direct appeal, Miller only asserted that trial counsel, Mickey Johnson, was ineffective for withdrawing Miller's insanity defense and did not allege that trial counsel was ineffective for failing to provide specific documents to defense expert, Dr. Scott. (C.R. Vol. 16, Tab 32, at 20-21). Not until collateral appeal did Miller add within this claim, the argument that trial counsel should have provided additional information to Dr. Scott. (Rule 32 C.R. Vol. 19, Tab 44, at 38-41). Because Miller failed to argue on direct appeal that trial counsel was ineffective for failing to provide documents to Dr. Scott, this portion of the claim is procedurally defaulted.[12] *See*

[12] Alternatively, this court finds this claim due to be denied on the merits. This court will address the underlying merits of the claim in connection with Miller's ineffective assistance of appellate counsel claims. *See* Part VI(B).

Baldwin v. Johnson, 152 F.3d 1304, 1311 (11th Cir. 1998) ("A habeas corpus petitioner may not present instances of ineffective assistance of counsel in his federal petition that the state court has not evaluated previously."); *Hunt v. Commissioner, Ala. Dep't of Corr.*, 666 F.3d 708, 730–31 (11th Cir.2012) (holding that "[t]o satisfy the exhaustion requirement, petitioners must present their claims to the state courts such that the reasonable reader would understand each claim's particular legal basis and specific factual foundation"); *Johnson v. Alabama*, 256 F.3d 1156, 1170 (11th Cir. 2001).

To the extent that Miller did raise this claim on direct appeal, this court finds that the state court's rejection of the claim was reasonable under *Strickland*. In addressing this claim, the Alabama Court of Criminal Appeals found that:

> Johnson met with Miller on a number of occasions before trial. Before forming a strategy for Miller's case, Johnson reviewed all of the investigative reports, diagrams, statements, photographs, videotapes, and scientific reports; he also talked with his client. Johnson filed a motion requesting funds for an independent psychological evaluation of Miller. The trial court granted his motion, and Johnson retained Dr. Charles Scott from the University of California to evaluate Miller. After talking with Dr. Scott and reviewing Dr. Scott's written report, Johnson determined that there was insufficient evidence to raise an insanity defense during the guilt phase. In his opinion, it was better to present Dr. Scott's testimony at the penalty phase because presenting his testimony during the guilt phase would have negated Dr. Scott's credibility and lessened the impact of the evidence during the penalty phase. Johnson made this decision after reviewing the reports from other

> mental-health evaluations of Miller, which were consistent with Dr. Scott's findings.
>
> After reviewing the evidence, Johnson made a strategic decision to concentrate his efforts and defense on the penalty phase of the trial. In his opinion, the State's evidence of Miller's guilt "was too overwhelming to seriously contest," given that he had no valid legal defense for the guilt phase. Accordingly, Johnson decided to concentrate on saving Miller's life.
>
> Johnson focused his efforts during the guilt phase on maintaining credibility with the jury. In accordance with this strategy, he admitted to the jury early on in the proceedings that the evidence of Miller's guilt was strong because he wanted to lessen the impact of the evidence against Miller. Johnson felt that his duty during the guilt phase was to make the State meet its burden of proof.

Miller, 913 So. 2d at 1159-60. The court determined that trial counsel's decision to withdraw the insanity defense was a "well-reasoned decision," part of a strategy to spare Miller's life, made after a "thorough investigation of the relevant law and facts of Miller's case." *Id*. at 1161.

Miller fails to meet his heavy burden of proving that his trial counsel performed unreasonably by pursuing this strategy. On the record before the state court, the strategic choices made by trial counsel were reasonable and constitutionally adequate in the circumstances. In preparation for Miller's trial, counsel hired Dr. Scott to conduct an evaluation of Miller to determine whether Miller was legally insane at the time of the murders. (C.R. Vol. 9, Tab 30, at 17-18). After evaluating

Miller, Dr. Scott concluded that Miller did not meet the definition of insanity under Alabama law. (C.R. Vol. 9, Tab 30, at 28-29). Trial counsel also reviewed the reports of a state psychologist and state psychiatrist, both of which were consistent with Dr. Scott's determination. (C.R. Vol. 9, Tab 30, at 93-94). Given that no mental health expert determined Miller to meet the definition of insanity, trial counsel's decision to withdraw the insanity defense was reasonable. *See Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009) ("[T]his court has never required defense counsel to pursue every claim or defense, regardless of its merit, viability, or realistic chance for success."). Likewise, the state court's determination that trial counsel was not ineffective for withdrawing the insanity defense was also reasonable.

b) Claim A(v): Miller's Claim That Trial Counsel Was Ineffective In His Guilt phase Opening Statement

Miller alleges that trial counsel was ineffective in his opening statement and "did little more than act as a second prosecutor." (Doc. 1, at 78). Specifically, Miller alleges that trial counsel was ineffective because he failed to challenge the facts as presented by the state and failed to present any defense theory to the jury. (*Id*. at 78-80; Doc 22, at 152-53). Miller also claims that trial counsel encouraged the jury to feel contempt for Miller by describing the killings as "brutal" and "inhumane." (Doc. 1, at 80).

In his opening statement, trial counsel said:

We are at a part of a process here that the law says is necessary. We all, at this point, have been assigned responsibilities. My responsibility and Mr. Blackwood's responsibility is to make sure that in this case, as in any other case, that we keep the burdens where the law says the burdens belong, that we challenge any evidence or any statement that is made that we think is wrong.

Our responsibility, however, is not – and is not ever the responsibility of a lawyer to do things frivolous. And we will not do that in this case.

Since August the 5th of 1999, I have probably had dozens, if not hundreds, of cameras and microphones and tape recorders stuck in my face asking me what happened here, I guess presumably on the theory that I would disclose something that would make all of this seem logical.

I have not said anything that makes this seem logical and reasonable because I don't know anything. You won't hear anything coming from the defense that makes this seem logical and reasonable. To present anything in that regard would be frivolous. We will not engage in frivolity.

The responsibility that Mr. Blackwood and I have we accept and we will do what our responsibility is, but we will not do anything frivolous. That would be irresponsible.

I will not offer you any evidence in this case that would make this act seem any less brutal and any less inhumane than it was. If you want to know what happened in this case, I think you just got a pretty good recitation of what happened in this case. I think [the prosecutor] got most of it right. Some of it seems to me to be a little embellished, but so what. Fundamentally, you heard what happened.

Now, the most serious responsibility in this case is placed on you. And you have gone through the process of jury selection and you are the ones who survived the process of jury selection.

And you did not survive because you don't have opinions about this case. You would be – it would be unnatural, from what most of you have seen and heard, not to have an opinion in this case. You survived because you have said we will not let our opinions affect the responsibility that is placed on us in this case.

The responsibility that is placed on you in this case will be an awesome one, but I suggest this to you, at the end of this case – you will have to make at least two decisions in this case that places more responsibility on you than I will ever have in any case I will ever stand for in a courtroom.

But at the end, if you accept your responsibility in the same way I – that everyone else, not just me, that everyone else in this courtroom is accepting theirs, then at the end of this, when this is all over, you will be proud. You won't be ashamed, you will be proud of at least what you have done.

I don't expect that at any point in this case you will ever be anything but ashamed of what happened that caused us to be here. I'm not going to ask – for me to suggest anything to the contrary would be frivolous. You won't see anything frivolous done in this case.

You will see a lot of meaningful things, though, presented to you. There will be a lot of meaningful evidence and a lot of meaningful arguments made to you. The only thing I ask at this point is that you accept your responsibility as jurors and then we will all be proud that we participated in this. Thank you.

(R. Vol. 5, Tab 10, at 813-16).

In reviewing trial counsel's opening statement, the Alabama Court of Criminal Appeals found that trial counsel "focused his efforts during the guilt phase on maintaining credibility with the jury," strategically "admitt[ing] to the jury early on in the proceedings that the evidence of Miller's guilt was strong because he wanted to lessen the impact of the evidence against Miller." *Miller*, 913 So. 3d at 1159. The court described this strategy as "well-reasoned." *Id.* at 1161.

After reviewing the record, this court finds the state court's determination reasonable under *Strickland*. Trial counsel faced the significant challenge of defending a client who had murdered three individuals at two different locations, was observed by eye-witnesses at both locations, and was determined to be sane by every expert who examined him. Under the circumstances, trial counsel's decision to acknowledge the evidence against his client to save credibility for the penalty phase does not constitute deficient performance. *See Parker v. Head*, 244 F.3d 831, 840 (11th Cir. 2001) (recognizing that counsel's strategic decision to concede the defendant's guilt during opening statement to maintain credibility with the jury was reasonable in light of the substantial evidence against the defendant); *Florida v. Nixon*, 543 U.S. 175, 191-92 (2004) (recognizing that in light of substantial evidence of guilt in a capital trial, "counsel cannot be deemed ineffective for attempting to

impress the jury with his candor and his unwillingness to engage in 'a useless charade'").

Additionally, even if trial counsel's opening statement was unreasonable, Miller cannot show prejudice. In view of the entire record, Miller has not shown a reasonable probability that trial counsel's opening statement affected the jury's guilty verdict. *See United States v. Hatcher*, 541 F. App'x 951, 953 (11th Cir. 2013) (holding that a petitioner's ineffective assistance claim failed because petitioner failed to prove prejudice in light of overwhelming evidence of guilt). The evidence of Miller's guilt is simply overwhelming. One eye-witness saw Miller with a pistol at the location where the bodies of the first two victims were discovered. At the second location, an eye-witness saw Miller shoot the third victim. Finally, police found a firearm in Miller's truck that matched the spent shell casings found at the crime scenes. In light of the strong evidence of his guilt, Miller cannot establish any prejudice resulting from trial counsel's opening statement.

Miller fails to demonstrate that the state court's adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law *or* that it resulted in a decision that was based on an unreasonable determination of facts in light of the evidence presented in the state

court proceedings. *See* 28 U.S.C. § 2254(d). Thus, Miller is not entitled to habeas relief on this claim.

c) Claim A(vi): Miller's Claim That Trial Counsel Was Ineffective During The Presentation of The State's Guilt phase Evidence

Within this claim, Miller asserts two different instances in which he alleges trial counsel was ineffective. First, Miller alleges that counsel was ineffective for failing to object to the admission of crime scene photographs as well as to testimony from state experts Dr. Stephen Pustilnik and Dr. Angello Della Manna. (Doc. 1, at 81). Miller alleges that such evidence was irrelevant, inadmissible and "served no purpose other than to inflame the jury against Mr. Miller." (*Id*. at 81). Second, Miller alleges that his trial attorney failed to adequately cross-examine numerous state witnesses. (*Id*. at 80-87)

In his motion for new trial and on direct appeal, Miller raised only the claim that trial counsel was ineffective for failing to effectively cross-examine the state's witnesses. (R. Vol. 16, Tab 32, at 22-23). Miller's direct appeal briefs contain no mention of trial counsel's failure to object to any of the state's evidence. Therefore,

to the extent that Miller asserts that his trial counsel was ineffective for failing to object to the state's evidence, this court finds the claim procedurally barred.[13] *See Johnson v. Alabama*, 256 F.3d 1156, 1170 (11th Cir. 2001).

Turning then to Miller's contention that trial counsel was ineffective for failing to adequately cross-examine the state's witnesses, this court finds that the state court's rejection of this claim was reasonable under *Strickland*. In rejecting the claim, the Alabama Court of Criminal Appeals stated that trial counsel realized that the evidence of guilt in Miller's case was "too overwhelming to seriously contest," and therefore, trial counsel made the strategic decision to concede guilt early on and focus on the penalty phase of trial. *Miller*, 913 So. 3d at 1159-61. The court's determinations are supported by the record. Additionally, even assuming that trial counsel was ineffective in his cross-examination of the State's witnesses, the claim is due to be denied because he has not shown a reasonable probability that the outcome of the proceeding would have been different if trial counsel had conducted a more thorough cross-examination. The evidence leaves no doubt of Miller's guilt in the case. *See United States v. Hatcher*, 541 Fed. App'x 951, 953 (11th Cir. 2013).

[13] Alternatively, this court finds this claim due to be denied on the merits. This court will address the underlying merits of the claim in connection with Miller's ineffective assistance of appellate counsel claims. *See* Part VI(B).

Therefore, the state court's rejection of this claim was reasonable, and Miller is not entitled to habeas relief on this claim.

d) Claim A(vii): Miller's Claim That Trial Counsel was Ineffective for Failing to Present Mental Health Evidence During the Guilt Phase

Miller claims that trial counsel was ineffective for failing to present evidence during the guilt phase to allow the jury to convict Miller of anything less than capital murder. (Doc. 1, at 87-90). The capital murder offense with which Miller was charged required the jury to find that Miller had the specific intent to cause the death of at least two of his three victims pursuant to one scheme or course of conduct. Ala. Code § 13A-3-1. Miller contends that his trial counsel should have called Dr. Scott to testify that Miller suffered from a severe mental illness that prevented him from appreciating the nature and quality of his actions during the first two shootings.[14] (Doc. 1, at 87-88). Miller argues that Dr. Scott's testimony could have shown that Miller lacked the specific intent to cause the death of at least two of his three victims. (*Id*. at 88).

[14] Dr. Scott stated in his report that, "It is also my opinion that at the moment of the first shooting, Mr. Miller may not have appreciated the nature and quality of his actions as he expressed that he suddenly found himself shooting without the intention of doing so." (Doc. 47-31, at 22). Dr. Scott's report also stated that Miller heard "noises" and experienced tunnel vision at the time of the first two shootings. (*Id*. at 9-10).

The Alabama Court of Criminal Appeals rejected this claim, finding that Miller failed to show that trial counsel was ineffective for failing to present a guilt phase defense, and finding that Miller suffered no resulting prejudice. *Miller*, 913 So. 3d at 1161. For the reasons discussed below, the state court's rejection of this claim is reasonable.

A review of the record shows that trial counsel chose not to present the testimony of Dr. Scott or challenge the *mens rea* element of the murders for sound strategic reasons. During the hearing on the motion for new trial, Miller asked trial counsel why he did not present Dr. Scott's testimony during the guilt phase of trial:

> Q. Let me ask you this. Was there a particular reason why you decided to introduce Dr. Scott's testimony only in the mitigation phase and not in the trial in chief?
>
> A. Yes, sir.
>
> Q. Why is that?
>
> A. Actually I discussed it with Dr. Scott as to what my thinking was. What my thinking was was that I did not want him to lose his credibility in the guilt phase when I did not think that that testimony would have any particular bearing at that point in time. If the jury heard it in the guilt phase at a time when I believed that the evidence would have been pretty much conclusory at that point, then I thought it would have lost its impact for whatever benefit I could get out of it in the sentencing phase.

(C.R. Vol. 9, at 21).

Based on these concerns, as well as the strong evidence that the shootings were part of a single course of conduct, Miller's trial counsel chose to forego a guilt phase defense to focus on saving Miller's life during the penalty phase. As recognized by the Alabama Court of Criminal Appeals, this decision was "made only after a thorough investigation of the relevant law and facts of Miller's case." *Miller*, 913 So. 3d at 1161. The Supreme Court has recognized this exact type of strategic trial decision to be "virtually unchallengeable." *Strickland*, 466 U.S. at 690-91. Because Miller has failed to show that no reasonable attorney would have chosen to defer Dr. Scott's testimony to the penalty phase of trial, Miller cannot show that his trial counsel's performance was deficient in this regard.

Miller also fails to show that he suffered prejudice as a result of trial counsel's decision to not present mental health evidence during the guilt phase. Significant evidence shows that Miller intended to commit at least two of the three murders pursuant to a single course of conduct. Miller specifically sought out Christopher Yancy and Lee Holdbrooks and shot them multiple times. He then drove to a second location where he specifically sought out Terry Jarvis and shot him multiple times. A reasonable jurist could conclude that a different outcome of the trial was not a reasonable probability had trial counsel argued that Miller lacked the *mens rea* for

capital murder. Therefore, the state court's rejection of this claim was not an unreasonable application of *Strickland*.

e) Claim A(xii): Miller's Claim that Trial Counsel Denied Miller Effective Assistance in His Penalty phase Opening Statement

Miller next alleges that trial counsel failed to present an effective penalty phase opening statement by failing to present a coherent preview of the mitigation case, undermining Dr. Scott's credibility, and effectively conceding the aggravating circumstance required for Miller to be eligible for the death penalty. (Doc. 1, at 96). In support of his argument, Miller points to trial counsel's statement made in response to the state's query regarding what was in Miller's heart at the time of the shooting: "I think I can answer what was in Mr. Miller's heart . . . the overwhelming desire to take a life, that's what was in Alan Miller's heart. R 1232." (Doc. 22, at 158). Miller also faults trial counsel for stating that Miller "believed in the death penalty," despite the lack of evidence to support this assertion. (*Id*. at 159). Finally, Miller argues that trial counsel described Miller as "atrocious" and "vile" by telling the jurors he wanted them to "be able to say . . . what my vote meant was no matter what anybody does, no matter how vial [sic] they are, they don't deserve to die. R 1332." (Doc. 22, at 160).

Trial counsel offered the following opening statement in the penalty phase:

Ladies and gentlemen, let me see if I can help the state in one respect and that is I think I can answer what was in Mr. Miller's heart. Same thing that this kind of impassion the argument was designed to put in your heart and that is the desire, the overwhelming desire to take a life, that's what was in Alan Miller's heart.

I don't think we need any experts up here to tell us that, I think every one of you will come to that conclusion and it would be a very logical one.

But there are a couple of words that have been used here too that I just want to talk about briefly. First one being, first question that was posed is what is justice?

Well, I really think that there is only one way to get real justice out of this and that would be the taking Alan Miller's life would restore those other three, that would be real justice. And if you had - - if there was some option, some verdict form that could be given to you that would bring that back, make that happen, then I would sit here and beg you to sign that and not even go back to the room before you did, that all twelve of you do that and if you needed thirteen, I would sign it with you because that would be real justice. Anything else that comes out of this case is going to be imperfect justice.

Mr. Bostick talked about mercy. Now, there is no secret to you that the State of Alabama is asking you to recommend that the state take the life of Alan Miller.

I am asking you to recommend that the state not take his life, that is not mercy because I will never stand here and define merciful with locking someone up in a cage for the rest of their life. I see nothing merciful about that. This is not about mercy. It's about some form of imperfect justice that we have in our - - in the wisdom of those minds that we have elected to send to our legislatures, they have decided that this is our system of justice.

Now, it is no great surprise to me what your verdict was going to be in this case, but still when I hear it it hurts me, shocks me because your verdict is already decided, you have already decided by your verdict that Mr. Miller will die in prison. It's just a question now of whose hands will it be at, will it be at your hands or at the hands of someone who I think wants to withhold - - to keep those decisions for themselves.

So that's the decision that you have to make now, not whether Mr. Miller dies in prison because he will, you've already - - you've dictated that by your verdict.

What we have now, though, is that part of the trial that has been what this trial has been about from the start, and that is what do we do about this man, what do we do in our service here for an imperfect justice.

And at this point we will be a little more active than we have been until now. We will put on a witness, Dr. Scott, who is a psychiatrist. Dr. Scott was employed to be perfectly frank with you in the hope that he would find that Alan Miller met the legal definition of being insane, because had he done that, and had we been able to prevail, none of this would have happened, he wouldn't be dying in prison, that's why he was brought here.

But Dr. Scott enjoys a very good reputation of being thorough and being objective. And despite what I know his efforts were to try to get there, he couldn't, he just couldn't be objective about it.

Because of that - - but he did learn a lot of things and this is where this case rests at this point and that is, why did all of this happen and what meaning can we make of any of this?

And Alan Miller has shared with Dr. Scott and he will share with you what was on his mind that day and he will tell you that despite all of these things that were on his mind and despite the rather significant emotional and psychological problems that disturb Alan Miller, he

wasn't insane but he was suffering from a personality disorder and that personality disorder is one that the law recognizes not as a defense to doing what Alan Miller did, there is no defense to that, but as a mitigating circumstance.

Now, Mr. Bostick challenged me to explain to you why this was not atrocious, especially atrocious, cruel, heinous and I really don't - - I mean, I will accept that challenge by saying this, I've never seen a murder that wasn't. And I don't think that Mr. Bostick or any prosecutor that I have ever known has ever stood up in a trial where their job was to prosecute someone who murdered someone and say, well, this one is not too bad; as murders go, this one is on the light side. You're not going to see that in any case. Murder is just not that way.

What you have been failed - - or what you have failed to be informed of at this point is, that in a capital sentence, the type of exceptional cruelty, heinousness, atrocity that we're talking about is something that goes above and beyond those facts which simply amount to capital murder. Because we continue here to strain in trying to reach some balance, we continue to strain, we're trying to quantify which type of murder is heinous, which type - - I guess contrary that, well, which type is just okay, as if there is such a thing. I don't even know how you explain all of that. I don't know how the law explains that in all honesty.

Nonetheless, we sit here with this to face in our system of justice. If anyone, Alan Miller or anyone else, had shot one of these victims on Monday, come back the next day and for a completely different reason shot another one, and come back the next day and for a completely different reason shot another one, we wouldn't be in this part of the trial because that wouldn't be capital murder.

Now, somebody explain to me what sense that makes. Somebody explain to me you leave the same number of victims out there, the same number of victims' families out there but by some definition of justice those victims and those families don't deserve the same treatment.

So I am saying that any effort we make to quantify what is atrocious and cruel and heinous is a folie, it all leaves.

What Dr. Scott will tell you, though, is that on August the 5th and probably for many years prior to August the 5th that Alan Miller was just a tortured soul. You've heard the testimony about Alan Miller's belief, and I think Dr. Scott's opinion will be that to a great extent Alan Miller's belief was on perceived events and probably not even real events, but you will hear him talk about how Alan believed and you've heard the testimony that people were spreading rumors about him, people were picking on him, that type of thing. Because of that belief, whether it's a fact or not, it was a belief, and based on that belief his tortured soul took the lives of three people that day.

And this is - - this is where - - I don't know any other fact that demonstrates the falling [sic] of this part of the law in this, if Alan Miller were not sitting at that table right there, it's been stated that Alan Miller had been called here like he might have been on August the 4th of last year to be a juror because he would have been the state's ideal pick. He would have been the foreman of a capital murder jury because he believed in the death penalty. He just decided that he couldn't impose it.

And we can labor all we want to in this courtroom, he'd be ideal, because that's the right that is reserved to the state and I will reject that today, I reject it out, I will reject if for the rest of my life. I don't believe that that is a decision that can be made by anyone and still justify a value system that we want everybody out there to have. We want our children to have it. But more than that, we want everybody else's children to have it because if all children had that, we wouldn't see children killing other children, it would just make no sense.

Because a couple of years ago I would have been - - I know how all of you feel about the death penalty because we asked questions about it and you answered the questions about it.

A couple of years ago I would have been one of those that said I was strongly in favor of that and I would not be sitting here today saying things that I'm saying. But today I am opposed to it and not because I'm representing Alan Miller, it wasn't that at all, it hasn't been this event that caused me to change my mind. It is because I come to the realization of something when I watched children killing children because they were tortured souls.

And there is one fundamental notion that is necessary to explain what all of this is about and that is that we all, there are always going to be people out there, always going to be tortured souls out there who agree with the notion that the death penalty is appropriate. And we can sit here and try to make - - define that to a sophisticated system, if we want to, but we won't. Unless we live in a world where everyone has one value in their value system and that is no matter how atrocious, no matter how vial [sic] a person is, they don't deserve to die, they deserve to live.

As long as we attempt to try to quantify the way that you will have to try to quantify in your deliberations whether this is a person who deserves to live, then we will always have that. We can't eliminate that idea from our system of values. We can't eliminate it from our national conscience, it seems to me. And we can believe that, well, it might work out fine if we could confine it to a courtroom but we can't.

So we will put on one witness. We'll put on Dr. Scott who will take you through, and I think you will find his testimony most interesting because of the openness of which Alan talked to him about what was on his mind, about why. And I just know you've got to be sitting here in puzzlement like I am, how can something like this happen.

Well, explanation is not a justification, is not an excuse, it's not to arouse sympathy for Alan Miller. It is to try to explain to you that yes, there are tortured souls out there that believe in the death penalty and they are willing everyday to administer that somebody does not satisfy their definition of a good person. Once you cross that line of

being violent, once you cross that line of being mean and cruel, then it's time to invoke the death penalty.

And at the end I will ask you to consider that your verdict would be most meaningful in this case. And you're on stage, you know that. The media is out here. When you get through, they will probably want to ask you questions and you can answer their questions, if you want to, of whatever your verdict is.

But the question that you will have - - in my heart of hearts I believe the only question that really matters that you will have to answer is to your children or your grandchildren what did you do, what did your vote say, not what you selectively do as a jury but what you, every one of you, what your vote meant.

And I want you to be able to say and this is what I'm asking you to say, to go home and you say, what my vote meant was no matter what anybody does, no matter how vial [sic] they are, they don't deserve to die. And that I suggest to you is what this part of the case is about and what this case have been about from the start.

Thank you very much.

(R. Vol. 8, Tab 20, at 1323-34).

In denying this claim, the Alabama Court of Criminal Appeals stated:

We have reviewed trial counsel's opening statement in its entirety. Consistent with counsel's trial strategy - as testified to during the hearing on Miller's new-trial motion - counsel elected to acknowledge Dr. Scott's conclusion that there was no basis under Alabama law to support an insanity defense in an effort to retain his credibility before the jury and to secure an advisory verdict of life imprisonment without parole, rather than the death sentence. Given the overwhelming evidence of Miller's guilt-including eyewitness testimony identifying Miller as the shooter - counsel had little choice but to acknowledge Miller's guilt. Accordingly, counsel attempted to gain the jury's sympathy by using Dr.

> Scott's testimony to portray Miller as a "tortured soul" whose delusions drove him to commit a series of horrific acts. Indeed, our review of counsel's argument reveals it to be an impassioned plea that the jury spare Miller's life.

Miller, 913 So. 3d at 1162-63.

This court finds that, although trial counsel's opening statement may not have been perfect, a reasonable jurist could conclude that trial counsel's statement was not professionally unreasonable. In his opening statement, trial counsel argued the absence of any good reason for the jury to recommend the death penalty in Miller's case. Trial counsel pointed out that taking Miller's life could not bring back the lives of any of the three victims and that the jury, by finding Miller guilty, had already sentenced Miller to life in prison. (R. Vol. 8, Tab 20, at 1323-26). Trial counsel then argued that, regardless of what the jury might think of Miller personally, he did not deserve the death penalty. (R. Vol. 8, Tab 20, at 1327-32). Finally, trial counsel previewed Dr. Scott's testimony and stated that, although Dr. Scott was hired by the defense to determine whether Miller was sane, Dr. Scott ultimately concluded that Miller did not meet the definition of insanity under Alabama law. (*Id*. at 1332-33). Although some of trial counsel's statements seem odd when viewed individually, the statements are reasonable when placed in the context of trial counsel's entire statement. *See Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1253 (11th Cir.

2011) (holding that counsel's individual statements were not unreasonable when placed in context).

Having reviewed the transcript, this court finds that a reasonable jurist could conclude that trial counsel's penalty phase opening statement was not unreasonable. Additionally, this court concludes that given the brutal nature of this crime, a reasonable jurist could conclude that the outcome of the penalty phase would not have been different but for trial counsel's statement. Therefore, Miller fails to demonstrate that the state court's adjudication of this claim was unreasonable.

2. Claims Raised For the First Time On Collateral Appeal

Miller raised eleven of his ineffective assistance of trial counsel claims for the first time on collateral review. In reviewing these claims, the Rule 32 court determined that the claims were procedurally barred under Rule 32.2(a) of the Alabama Rules of Criminal Procedure because Miller could have raised the claims on direct appeal but failed to do so. (C.R. Vol. 43, Tab 75, at 1968-70). Miller abandoned the claims on appeal from the denial of his Rule 32 petition, never raising them in the appellate courts.

Federal review of a habeas petitioner's claim is barred by the procedural default doctrine if the last state court to review the claim states clearly and expressly that its judgment rests on a procedural bar. *Harris v. Reed*, 489 U.S. 255, 263 (1989).

Because the Rule 32 court was the last state court to address these claims and because it determined that the claims were procedurally barred under Rule 32.2(a), this court finds the claims are barred from federal habeas review.[15] *See Brownlee v. Haley*, 306 F.3d 1043, 1065–66 (11th Cir. 2002) (holding that Rule 32.2(a) of the Alabama Rules of Criminal Procedure is an independent and adequate state law ground); *Borden v. Allen*, 646 F.3d 785, 814 (11th Cir. 2011).

With this backdrop, the court finds the following of Miller's ineffective assistance of trial counsel claims are procedurally barred:

1. Claim A(i): Miller's Claim That Trial Counsel Failed to Conduct an Adequate Investigation and Failed to Uncover Evidence That Would Have Led the Jury to Find Him not Guilty of Capital Murder or Would Have led the Trial Court to Sentence Him to Life Without Parole

2. Claim A(iv): Miller's Claim That Trial Counsel Was Ineffective During Jury Voir Dire.

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[15] Miller argues in his reply brief that the Alabama Court of Criminal Appeals addressed Miller's ineffective assistance of trial counsel claims on the merits, and, therefore, the claims are not procedurally barred. (Doc. 22, at 100-01). However, this argument lacks merit. The Alabama Court of Criminal Appeals examined Miller's ineffective assistance of trial counsel claims, but did so for the limited purpose of reviewing Miller's ineffective assistance of appellate counsel claims. (Rule 32 C.R. Vol. 38, Tab 63, at 1-148). The Alabama Court of Criminal Appeals never addressed Miller's trial counsel claims independently because Miller abandoned his ineffective assistance of trial counsel claims following the Rule 32 court's determination that the claims were procedurally barred. Miller only raised claims of ineffective assistance of *appellate* counsel in his brief to the Alabama Court of Criminal Appeals. (Rule 32 C.R. Vol. 38, Tab 63, at 1-148). Therefore, the Rule 32 court was the last court to address these claims, and that court's express invocation of a state procedural bar is sufficient to preclude habeas review. *See Johnson v. Singletary*, 938 F.2d 1166, 1173 (11th Cir. 1991). Additionally, as will be discussed in connection with Miller's ineffective assistance of appellate counsel claims, these ineffective assistance of trial counsel claims would be due to be denied on the merits even if they were not procedurally barred.

3. Claim A(viii): Miller's Claim That Trial Counsel was Ineffective for Failing to Object to Improper Statements Made in the State's Guilt phase Closing Argument

4. Claim A(ix): Miller's Claim That Trial Counsel was Ineffective During the Guilt phase Closing Arguments

5. Claim A(x): Miller's Claim That Trial Counsel was Ineffective During the Guilt phase Closing Arguments

6. Claim A(xi): Miller's Claim That Trial Counsel was Ineffective in Preparing for the Penalty Phase

7. Claim A(xiii): Miller's Claim that Trial Counsel Failed to Present Readily Available Evidence During the Penalty Phase

8. Claim A(xv): Miller's Claim that Trial Counsel was Ineffective during Penalty phase Closing Arguments

9. Claim A(xvi): Miller's Claim that Trial Counsel was Ineffective for Failing to Object to Improper Penalty phase Jury Instructions

10. Claim A(xvii): Miller's Claim that Trial Counsel was Ineffective for Failing to Request a Special Verdict Form

11. Claim A(xviii): Miller's Claim that Trial Counsel was Ineffective in Connection with the Sentencing Hearing

Miller argues in his reply brief that the procedural default is excused because his appellate counsel's performance constitutes cause and prejudice. (Doc. 22, at 101–04); *see Fortenberry v. Haley*, 297 F.3d 1213, 1222 (11th Cir. 2002) ("A petitioner can establish cause by showing that a procedural default was caused by constitutionally ineffective assistance of counsel under *Strickland v. Washington*, 466

U.S. 668, 690 . . . (1984)."). However, as will be discussed in Part VI(B), Miller does not have any meritorious ineffective assistance of appellate counsel claims. Therefore, he cannot show cause and prejudice to excuse the procedural default.[16] Alternatively, these ineffective assistance of trial counsel claims would be due to be denied, notwithstanding the procedural bar, because the claims lack merit.[17]

3. Claims Raised For the First Time Before This Court

Miller asserts two ineffective assistance of trial counsel claims in his petition that he failed to raise either on direct or collateral appeal. Miller's failure to present these claims to the state courts precludes Miller from now raising these claims for the first time before this court. *See Footman v. Singletary*, 978 F.2d 1207, 1211 (11th Cir. 1992) ("[A] habeas petitioner may not present instances of ineffective assistance of counsel in his federal petition that the state court has not evaluated previously.").

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[16] Analysis of Miller's ineffective assistance of appellate counsel claims will be identical to the cause and prejudice analysis. To determine whether Miller is correct that cause and prejudice exists, this court must determine whether appellate counsel's performance was ineffective. *Payne v. Allen*, 539 F.3d 1297, 1314 (11th Cir. 2008). To determine whether appellate counsel was ineffective in raising issues concerning trial counsel's performance, this court must determine whether Miller's ineffective assistance of trial counsel claims are meritorious. *Id.* Thus, this court's review, whether for the purposes of establishing cause and prejudice or for the purpose of analyzing Miller's independent ineffective assistance of appellate counsel claims, ultimately turns on whether Miller's underlying ineffective assistance of trial counsel claims are meritorious. *Id.* Because the review will be the same, this court will not address the cause and prejudice analysis at this time but, instead, will do so in connection with Miller's ineffective assistance of appellate counsel claims. *See* Part VI(B).

[17] *See* Part VI(B).

This court finds the following of Miller's claims to be procedurally barred for failure to exhaust them:

1. Claim A(iii): Miller's Claim That Trial Counsel Was Ineffective For Failing to Investigate or Develop Mitigation Evidence Following the Withdrawal of the Insanity Defense

2. Claim A(xiv): Miller's Claim that Trial Counsel was Ineffective in Connection with His Penalty phase Directed Verdict Motion[18]

Although these claims are procedurally barred, this court will nevertheless address the underlying merits of these claims below, in connection with Miller's ineffective assistance of appellate counsel claims.

B. MILLER'S INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL CLAIMS

Before reviewing Miller's ineffective assistance of appellate counsel claims, this court will address Miller's contention that the determinations of the Alabama Court of Criminal Appeals in the Rule 32 proceeding do not deserve deference under the AEDPA because the decision does not constitute an adjudication on the merits. (Doc. 22, at 104-05). Miller asserts that the decision of the Alabama Court of Appeals was not an adjudication on the merits because the court adopted large

[18] In his brief to the Alabama Court of Criminal Appeals on collateral appeal, Miller argued that *appellate counsel* was ineffective for failing to raise this claim. (Rule 32 R. Vol. 38, Tab 63, at 139-42). However, Miller never presented this claim as an independent ineffective assistance of trial counsel claim before any of the state courts. Thus, the claim is not exhausted.

portions of the Rule 32 court's opinion, which was itself, almost a verbatim adoption of the state's proposed order. (*Id.* at 104). However, the Eleventh Circuit has held that a state court's verbatim adoption of a state's proposed order is an "adjudication on the merits" and is entitled to AEDPA deference when both the petitioner and the State had an opportunity to present their version of facts to the court. *See Jones v. GDCP Warden,* 746 F.3d 1170, 1183–84 (11th Cir. 2014) ("Considering that a summary disposition of a *Strickland* claim qualifies as an adjudication on the merits, . . . , we can discern no basis for saying that a state court's fuller explanation of its reasons – albeit reasons drafted for the court by the State – is not entitled to AEDPA deference."); *Brownlee v. Haley*, 306 F.3d 1043, 1067 n.19 (11th Cir. 2002) (upholding the use of proposed orders adopted verbatim by trial judges "as long as they were adopted after adequate evidentiary proceedings and are fully supported by the evidence") (citations omitted); *Rhodes v. Hall*, 582 F.3d 1273, 1281-82 (11th Cir. 2009).

In the case at hand, the determinations of the Rule 32 court were made after conducting multiple days of hearings and allowing the parties to submit extensive briefing on all of Miller's claims. Likewise, the determinations of the Alabama Court of Criminal Appeals were made after each party submitted extensive briefing. Therefore, the Alabama Court of Criminal Appeals' determinations are entitled to

AEDPA deference. Having concluded that the determinations of the state court are entitled to deference, this court turns to the applicable standard of review for Miller's ineffective assistance of appellate counsel claims.

Claims of ineffective assistance of appellate counsel are analyzed under the same *Strickland* standard that is applicable to ineffective assistance of trial counsel claims. *Johnson v. Alabama*, 256 F.3d 1156, 1188 (11th Cir. 2001). To show entitlement to relief for his ineffective assistance of appellate counsel claims, Miller must demonstrate both that appellate counsel performed deficiently and that the deficient performance resulted in prejudice. *Heath v. Jones*, 941 F.2d 1126, 1130 (11th Cir. 1991). To demonstrate prejudice, Miller must show a reasonable probability that, but for his appellate counsel's performance, Miller would have prevailed on appeal. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000). To demonstrate a reasonable probability that Miller would have prevailed on appeal, he must demonstrate that at least one of his ineffective assistance of trial counsel claims is meritorious. *See Payne v. Allen*, 539 F.3d 1297, 1314-15 (11th Cir. 2008) ("[T]o determine whether [petitioner] has shown ineffective appellate counsel, we must determine whether [petitioner] has shown underlying meritorious ineffective-trial-counsel claims."). Because Miller's ineffective assistance of appellate counsel claims require this court to determine whether Miller's ineffective assistance of trial counsel

claims are meritorious, much of this court's review will focus on Miller's ineffective assistance of trial counsel claims. With this introduction, the court turns to Miller's ineffective assistance of appellate counsel claims.

1. Claim B(i): Miller's Claim that Appellate Counsel was Ineffective for Raising the Issue of Ineffective Assistance of Trial Counsel In the Motion for New Trial

Miller claims that appellate counsel acted unreasonably by presenting Miller's ineffective assistance of trial counsel claims in motion for new trial, thereby precluding counsel from raising those ineffective assistance of trial counsel claims before the Rule 32 court. (Doc. 1, at 124-28). Miller argues that under the Alabama Supreme Court decision in *Ex parte Ingram*, 675 So. 2d 863 (Ala. 1996), the proper procedure for presenting claims of ineffective assistance of trial counsel for review was to present the claims on collateral review. Miller alleges that as a result of appellate counsel's decision to raise the ineffective assistance of trial counsel claims at the motion for new trial stage, the claims were found to be procedurally barred under Ala. R. Crim. P. 32.2(a)(2) and (a)(4) at the Rule 32 proceeding. (Doc. 1, at 126-27). Miller contends that appellate counsel's decision was especially egregious given the fact that appellate counsel did not have a copy of the trial transcript when they raised the issue of trial counsel's ineffectiveness. (*Id*. at 125).

a) No Procedural Default

Respondent contends that this claim is procedurally defaulted because Miller did not raise the claim in his Rule 32 petition. (Doc. 16, at 63). However, as Respondent concedes, the Alabama Court of Criminal Appeals addressed the merits of the claim because the "claim was addressed in the evidentiary hearing and in the circuit court's order denying the petition." *Miller v. State*, 99 So. 3d 349, 362-66 (Ala. Crim. App. 2011). Because the Alabama Court of Criminal Appeals did not rely on a state procedural bar in addressing this claim, but addressed this claim on the underlying merits, the claim is not procedurally defaulted. This court will review the Alabama Court of Criminal Appeals' decision under AEDPA deference. *See Judd v. Haley*, 250 F.3d 1308, 1313 (11th Cir. 2001).

b) Merits

The last state court to issue a reasoned opinion on this claim was the Alabama Court of Criminal Appeals, which found that appellate counsel could properly assert the ineffective assistance of trial counsel claims on direct appeal. *Miller v. State*, 99 So. 3d 349, 362-66 (Ala. Crim. App. 2011). The court pointed to Rule 32.2(d) of the Alabama Rules of Criminal Procedure, which states that "[a]ny claim that counsel was ineffective must be raised as soon as practicable, either at trial, on direct appeal, or in the first Rule 32 petition, whichever is applicable." *Id*. at 363. The court also

concluded that regardless of whether appellate counsel's performance was defective, Miller suffered no prejudice because none of his ineffective assistance of trial counsel claims was meritorious. *Id*. at 365. Because this court finds that Miller did not suffer any prejudice, this court will not address whether appellate counsel performed unreasonably by raising the ineffective assistance of trial counsel claims at the motion for new trial stage. *See Duren v. Hopper*, 161 F.3d 655, 660 (11th Cir. 1998) ("[I]f a defendant cannot satisfy the prejudice prong, the court need not address the performance prong.").

Although the Rule 32 court found that Miller's claims of ineffective assistance of trial counsel were procedurally barred, the court nevertheless heard evidence regarding trial counsel's performance because Miller incorporated all of his ineffective assistance of trial counsel claims into his ineffective assistance of appellate counsel claims. Indeed, the majority of the evidence presented at the Rule 32 hearing was related to trial counsel's performance. After hearing evidence regarding the trial counsel claims, the court reviewed and denied all of Miller's trial counsel claims for the purpose of establishing that Miller was not prejudiced by his appellate counsel's performance.

Because Miller had the opportunity to present evidence related to the ineffective assistance of trial counsel claims, and because the Rule 32 court reviewed

Miller's ineffective assistance of trial counsel claims and found the claims to be without merit, Miller suffered no prejudice. Whether the Rule 32 court denied the trial counsel claims in connection with Miller's appellate counsel claims or denied the trial counsel claims outright, the result of the proceeding would have been the same – Miller's appeal would have been denied. Thus, Miller suffered no prejudice and is not entitled to *habeas* relief on this claim.

2. Claim B(ii & iii): Miller's Claim That Appellate Counsel Was Ineffective for Failing to Conduct an Adequate Investigation Concerning the Ineffective Assistance Miller Received from Trial Counsel AND Failing to Present Sufficient Evidence During the Hearing on the Motion for New Trial to Establish That Miller Suffered Prejudice as a Result of Trial Counsel's Performance[19]

Miller contends that appellate counsel, having raised the issue of ineffective assistance of trial counsel during the motion for new trial, was ineffective in investigating and presenting the ineffective assistance of trial counsel claims.[20] (Doc.

[19] Miller's brief to the Alabama Court of Criminal Appeals did not discuss appellate counsel's presentation at the hearing, but the court nevertheless addressed the issue because it was raised before the Rule 32 Circuit Court. (C.R. Vol 43, Tab. 76, at 21–22). Miller now separates appellate counsel's investigation and presentation into two separate claims, Claim (B)(ii) and Claim (B)(iii). Because the state court's decision does not lend itself to piecemeal review and the analysis of the claims is similar, this court will address the two claims together.

[20] Miller alleges that appellate counsel was deficient in the following ways: (1) appellate counsel only spent one hour with Miller prior to the hearing on the motion for new trial; (2) appellate counsel did not conduct sufficient legal research to prepare for the case; (3) appellate counsel did not interview trial counsel or any of Miller's family or friends and thus did not learn of possible mitigating evidence that trial counsel failed to present at trial; (4) appellate counsel failed to speak with Dr. Scott and thus did not learn that trial counsel had retained Dr. Scott only to evaluate Mr. Miller's sanity; (5) appellate counsel failed to gather any records, mitigation information, or

1, at 128). Specifically, Miller contends that appellate counsel was ineffective for failing to adequately investigate and present evidence related to any prejudice that Miller suffered as a result of trial counsel's performance. Miller contends that but for these deficiencies, appellate counsel would have been able to show that trial counsel was ineffective under *Strickland*. (Doc. 1, at 131-32).

a) No Procedural Default

Miller properly raised this claim on collateral appeal, and the Alabama Court of Criminal Appeals denied the claim on the merits. *Miller*, 99 So. 3d at 366-71. Therefore, this court will review the determinations of the state court under AEDPA deference.

b) Merits

The Rule 32 court rejected this claim, holding that Miller failed to demonstrate that appellate counsel's performance was deficient or that Miller suffered any prejudice. (C.R. Vol. 43, Tab 75, at 2740). The Alabama Court of Criminal Appeals affirmed the Rule 32 court, finding both that appellate counsel was not ineffective and that, even if appellate counsel were ineffective, Miller suffered no prejudice. *Miller*, 99 So. 3d at 366-71.

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materials that trial counsel should have gathered but did not; (6) appellate counsel did not effectively evaluate trial counsel's performance; and (7) appellate counsel failed to present evidence at the hearing to demonstrate that trial counsel's performance prejudiced Miller. (Doc. 1, at 128-32).

Although the state court found that appellate counsel reasonably investigated and presented Miller's ineffective assistance of trial counsel claims on appeal, serious questions remain regarding appellate counsel's performance. One of the main arguments that appellate counsel presented on appeal was that trial counsel was ineffective for failing to adequately investigate and present mitigating evidence. (*See* R. Vol. 16, Tab 32, at 22). However, appellate counsel did not attempt to investigate or present evidence demonstrating any prejudice Miller might have suffered as a result of trial counsel's performance. Miller contends that appellate counsel's failure to "investigate thoroughly the various ways in which his Trial Counsel had performed ineffectively and to gather and present evidence of the prejudice Miller had suffered as a result – solely because of a lack of time and not for any strategic reasons – violated his Constitutional rights." (Doc. 24 at 5).

Miller argues that the "Eleventh Circuit's ruling in *DeBruce* [*v. Commissioner*, 758 F.3d 1263 (11th Cir. 2014)[21]] strongly supports" this argument. (*Id.*). Specifically, he claims that:

> The Eleventh Circuit's rulings in *DeBruce* that trial counsel had unreasonably and ineffectively investigated available mitigating evidence and that DeBruce had been prejudiced thereby strongly support [his] arguments that his Trial Counsel's inexcusably inadequate investigation and presentation of mitigating evidence – in particular evidence of the horrific physical and emotional abuse he had suffered from his father, which the sentencing jury never heard – violated his Constitutional rights. *See* pp. 40, 43-44, 56-62, and 114-134 of Miller's Reply Brief.

(*Id*. at 4).[22]

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[21] In *DeBruce*, the petitioner alleged that trial counsel was ineffective for failing to investigate several issues that would have led counsel to uncover mitigating evidence that was not presented at his sentencing, "including that DeBruce experienced violence in his neighborhood and severe abuse at the hands of his sister, that he dropped out of school in the seventh grade, suffer[ed] from mental impairments and low intellectual functioning, and ha[d] a painful intestinal disorder." *DeBruce*, 758 F.3d at 1270. DeBruce argued that a pretrial report created for the defense by a social worker, noting that he had attempted suicide several times, had refused special education, dropped out of school at the age of sixteen, had a history of drug and alcohol abuse, and was in the low average range on intelligence, should have alerted counsel to the need to make further investigation into his mental health and background. *Id*. at 1271. The Eleventh Circuit Court of Appeals found that counsel's failure to "develop the troubling leads in DeBruce's competency report" was deficient. *Id*. at 1275. Further, the Court found that DeBruce suffered prejudice because the omitted mitigation evidence, when compared to the little evidence actually introduced at trial, undermined confidence in the sentencing phase of the trial. *Id*. at 1275-79.

[22] The court acknowledges that *DeBruce* does support Miller's claim that appellate counsel's performance in this regard was deficient. However, as discussed below, Miller is unable to establish that he was prejudiced by appellate counsel's deficient performance because his underlying ineffective assistance of trial counsel claims lack merit.

At the hearing on the motion for new trial, appellate counsel called Aaron McCall of the Alabama Prison Project to testify that he had been available to conduct a mitigating investigation for Miller's case and had offered his services to trial counsel. (Rule 32 C.R. Vol. 34, Tab 60, at 36-37). Appellate counsel, however, never requested that McCall conduct an investigation into what mitigating evidence could have been presented. (Rule 32 C.R. Vol. 34, Tab 60, at 48-49). Appellate counsel also called clinical psychologist Dr. Bob Wendorf, who reviewed Dr. Scott's report and testified about a "distinct possibility" that Miller and his father suffered from schizophrenia. (C.R. Vol. 9, Tab 31, at 122). Dr. Wendorf also testified that Miller *might* have had some other mental illnesses. (*Id*. at 114-21). However, appellate counsel never asked Dr. Wendorf to perform an independent assessment of Miller to diagnose whether he did in fact have a mental illness. (Rule 32 C.R. Vol. 34, Tab 60, at 48-50). When asked about his strategy, appellate counsel Hill testified that, "[i]n retrospect[,] . . . it would have probably been a better practice" to have had Dr. Wendorf actually perform an assessment of Miller. (Rule 32 C.R. Vol. 34, Tab 60, at 48). This court agrees.

Because appellate counsel failed to investigate any of the mitigating evidence they argued should have been presented, appellate counsel could not show that Miller suffered any prejudice – one of the two prongs required to demonstrate ineffective

assistance of counsel. The court questions whether any reasonable jurist could conclude that appellate counsel's failure in this regard would constitute reasonable performance under *Strickland*. *See DeBruce,* 758 F.3d at 1269-75. *See also Ferrell v. Hall*, 640 F.3d 1199, 1236-39 (holding appellate counsel's performance unreasonable when counsel failed to sufficiently investigate the petitioner's background and mental health). However, this claim is still due to be denied because, as discussed below, none of Miller's ineffective assistance of trial counsel claims is meritorious. Therefore, Miller cannot demonstrate any resulting prejudice.

3. Claim B(iv): Miller's Claim that Appellate Counsel was Ineffective for Failing to Adequately Present the Claims of Ineffective Assistance of Trial Counsel That Were Raised in Miller's Motion for New Trial

Miller alleges that appellate counsel ineffectively presented and argued the following claims in his motion for new trial: (a) trial counsel was ineffective in his guilt phase opening statement; (b) trial counsel was ineffective for withdrawing the insanity defense; (c) trial counsel was ineffective for failing to present mental health evidence during the guilt phase; (d) trial counsel was ineffective in his penalty phase opening statement; and (e) trial counsel was ineffective in failing to adequately investigate and present mitigation evidence during the penalty phase. (Doc. 1, at 134-42). Miller presented this same claim before the state court; therefore, this court must

determine whether the state court's rejection of this claim was reasonable under AEDPA deference.

In reviewing this claim, the Alabama Court of Criminal Appeals recognized that "[i]n order to establish that his appellate counsel were ineffective in the manner in which they presented the claims of ineffective assistance of trial counsel in the new-trial proceedings and on appeal, Miller had to first establish that his underlying claims of ineffective assistance of trial counsel had merit." *Miller*, 99 So. 3d at 373 (citation omitted). Thus, the Alabama Court of Criminal Appeals turned its attention to Miller's ineffective assistance of trial counsel claims. This court will do the same, giving AEDPA deference to the appellate court's determinations.

a) Miller's claim that trial counsel's opening statement during the guilt phase was ineffective

Miller alleges that trial counsel was ineffective in his opening statement and "did little more than act as a second prosecutor." (Doc. 1, at 78). Miller contends that trial counsel was ineffective because he failed to challenge the facts as presented by the state, and failed to present any defense theory to the jury. (*Id*. at 78-80; Doc 22, at 152-53). Miller also asserts that trial counsel encouraged the jury to feel contempt for Miller by describing the killings as "brutal" and "inhumane," and telling

the jurors he did not believe they would feel "anything but ashamed of what happened that caused all of us to be here." (Doc. 1, at 80).[23]

(1) No Procedural Default

Miller properly raised this claim on collateral appeal, and the Alabama Court of Criminal Appeals addressed the claim on the merits. *Miller*, 99 So. 2d at 392-95. Therefore, this court will review the determinations of the state court under AEDPA deference.

(2) Merits

The Rule 32 court denied this claim, holding that trial counsel's opening statement was "the product of a reasonable, strategic decision to win favor with the jury by not presenting frivolous arguments in order to spare Miller's life." (C.R. Vol. 43, Tab 75, at 98). The trial court also held that Miller failed to establish prejudice because he did not point to any evidence that the outcome of the trial would have been different but for trial counsel's opening statements. (*Id*.) The Alabama Court of Criminal Appeals affirmed the determinations of the Rule 32 court, emphasizing the difficult task trial counsel faced in defending a case in which the evidence clearly established Miller's guilt. *Miller*, 99 So. 3d at 392-95.

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[23] For the full text of trial counsel's guilt phase opening statement, *see supra* Part VI(A)(1)(b).

After reviewing trial counsel's opening statement, this court cannot say that the state court's decision was unreasonable. At the Rule 32 hearing, trial counsel explained that his trial strategy throughout the trial was to focus on the penalty phase of trial and to avoid presenting to the jury frivolous arguments that would diminish his credibility. (Rule 32 C.R. Vol. 30, Tab 59, at 220-21). This strategy was based in part on the fact that a veniremember told the trial court that he had overheard another veniremember expressing his opinion that the trial was a waste of time because the evidence in the case was overwhelming. (Rule 32 C.R. Vol. 30, Tab 59, at 236). Trial counsel stated that his purpose in making his opening statement was to emphasize to the jury that although the evidence of Miller's guilt was "largely uncontradicted," the jury process was not a waste of time. (C.R. Vol. 9, Tab 30, at 63).

Trial counsel's opening statement followed this strategy. He emphasized the important role the jury played in the trial, and reassured the jury that he would not present any "frivolous" arguments. (C.R. Vol. 5, Tab 9, at 813-16). Trial counsel's decision not to contest guilt to maintain credibility with the jury and focus on the penalty phase of trial was not unreasonable. *See Harvey. v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1243 (11th Cir. 2011) (holding that "conceding guilt and focusing on the penalty phase is a valid trial strategy for *Strickland* analysis").

To the extent that Miller faults trial counsel for stating that, "I will not offer you any evidence in this case that would make this act seem any less brutal and any less inhumane than it was," this court finds trial counsel's statement not to be unreasonable when viewed in context of trial counsel's full opening statement. At the hearing on the motion for new trial, trial counsel testified that his purpose in making this statement was to communicate to the jury that he was not contesting the terrible nature of the crime. (C.R. Vol. 9, at 60). This theme was in keeping with that of trial counsel's opening statement as a whole.

Additionally, even if trial counsel's performance in connection with his guilt phase opening statement was defective, Miller cannot show that the outcome of the guilt phase would have been different but for trial counsel's statements. As this court has stated repeatedly, the evidence of Miller's guilt was overwhelming. Therefore, this claim lacks merit.

b) Miller's claim that trial counsel was ineffective for withdrawing the insanity defense

Miler next alleges that trial counsel was ineffective for failing to present an insanity defense during the guilt phase of trial. (Doc. 1, at 135).

(1) No Procedural Default

Miller properly raised this claim on collateral appeal, and the Alabama Court of Criminal Appeals addressed the claim on the merits. *Miller*, 99 So. 3d at 373-92. Therefore, this court will review the determinations of the state court under AEDPA deference.

(2) Merits

The Rule 32 court denied this claim, finding that Miller failed to show that trial counsel's withdrawal of the insanity defense was unreasonable or that withdrawal of the insanity defense prejudiced Miller. (C.R. Vol. 43, Tab 75, at 97-99). In determining that trial counsel was not ineffective for withdrawing the insanity defense, the Rule 32 court stated:

> Miller's trial counsel could not be deficient for withdrawing the insanity defense because none of the psychological or psychiatric experts who evaluated Miller before trial concluded that Miller met the legal definition for insanity.
>
> Miller, through counsel, originally pled not guilty by reason of mental disease or defect. (C. 1) To qualify under the legal definition of insanity, Miller bore the burden [of] demonstrating that he "was unable to appreciate the nature and quality or wrongfulness of his acts." Ala. Code § 13A-3-1. However, as demonstrated during trial and the evidentiary hearing, none of the four mental health experts who examined Miller concluded that he was unable to appreciate the nature and quality of his actions. (R. 1384, R2. 72-74, Rule 32 R. 248)
>
> . . . .

> Thus, trial counsel could not have provided any expert opinion testimony to credibly argue to the jury that Miller was legally insane. Any argument that Miller was legally insane could have been effectively rebutted from Miller's own expert's conclusion that he was not insane. (R. 1384) Johnson testified that he was aware of each of these reports and that neither Dr. Hooper's, nor Dr. McClaren's, nor Dr. Scott's reports conflicted on the issue of Miller's sanity at the time of the offense. (R2. 73-74, Rule 32 R. 251) Johnson testified that after receiving Dr. Scott's report, he discussed the findings with Dr. Scott and ultimately decided to withdraw the insanity defense on May 24, 2000. (Rule 32 R. 91-92) Johnson stated during the evidentiary hearing that if any of the four doctors who evaluated Miller had declared that Miller was insane at the time of the offense, such a finding would have altered his strategy and that he would have used that opinion as part of his defense. (Rule 32 R. 248)

(C.R. Vol. 43, Tab 75, at 80-82).

The Rule 32 court also found that Miller failed to establish any resulting prejudice:

> Although Miller now claims that his trial counsel should have presented more information to Dr. Scott or obtained additional expert opinion regarding Miller's sanity, the record indicates that even if such additional measures were taken, the result would be the same: that Miller does not meet the requirements for insanity under Alabama law. At the evidentiary hearing, Dr. [Catherine] Boyer [Miller's Rule 32 psychologist] testified that in her opinion, Miller experienced a dissociative episode at the time of the shootings and that this opinion would be important as a mental health professional in determining whether Miller was sane or insane at the time of the shootings. (Rule 32 R. 719-20)
>
> However, incredibly, Dr. Boyer never testified that in her opinion, Miller was legally insane at the time of the shootings. When pressed on this crucial question by counsel for the State, Dr. Boyer stated "I really

don't know if I can answer it." (Rule 32 R. 757) Most importantly, Dr. Boyer testified that after her complete investigation, if she had been called to testify as to Miller's sanity at the time of trial, she would have had no opinion. (Rule 32 R. 758) Therefore, Miller has failed to present any evidence that a mental health expert would have been available to testify at trial that Miller was insane at the time of the shootings.

Miller also failed to present any evidence during the evidentiary hearing that conflicts with the evidence and expert opinion regarding Miller's sanity at the time of trial. Dr. Scott never testified that his opinion at the time of trial that Miller was not unable to appreciate the nature and quality or wrongfulness of his actions had changed. Although Dr. Scott stated that it was "possible" that had he obtained additional information and conducted additional testing relating to a dissociated disorder his diagnosis could have changed, he failed to testify that such information did in fact change his opinion. (Rule 32 R. 364) Like Dr. Boyer, Dr. Scott never testified that in his opinion, Miller met the requirements for insanity under Alabama law.

Equally as important in determining that Miller was not prejudiced by the withdrawal of the insanity plea was the testimony of Dr. McClaren during the evidentiary hearing. Before trial in the fall of 1999, Dr. McClaren was hired to conduct a forensic psychological evaluation of Miller. (Rule 32 R. 773) After conducting his evaluation, Dr. McClaren concluded that Miller was a "non psychotic man of average intelligence." (Rule 32 R. 778) Dr. McClaren also concluded that Miller was not insane under Alabama law at the time of the offense. (Rule 32 R. 780)

After becoming involved in the case again for purposes of this Rule 32 proceeding, Dr. McClaren testified that he reviewed additional testimony, the reports of Dr. Scott and Dr. McDermott, additional psychological testing, school records as well as the testimony during the evidentiary hearing. (Rule 32 R. 783-84) Dr. McClaren then testified that after his review of this new information, nothing had changed his opinion that Miller was not legally insane at the time of the shootings.

(Rule 32 R. 784) In Dr. McLaren's opinion, Miller functioned as a non psychotic man at the time of the shootings. (Rule 32 R. 792)

> The testimony of all three mental health experts during the evidentiary hearing as well as the evidence contained in the mental health reports issued during the trial and the trial record itself are consistent: all indicate that Miller was not unable to appreciate the nature and quality or wrongfulness of his actions. No testimony has even been presented during trial or in this Rule 32 proceeding that Miller was insane at the time of the shootings under Alabama law. Therefore, Miller has failed to demonstrate a reasonable probability that the outcome of his proceeding would have been different had trial counsel not withdrawn the insanity plea because the record resoundingly evidences that Miller was in fact not insane at the time of the shootings. Accordingly, because Miller has failed to demonstrate prejudice under *Strickland*, this claim is denied.

(C.R. Vol. 43, Tab 75, at 84-87). The Alabama Court of Criminal Appeals affirmed the Rule 32 court's determinations:

> The record supports the circuit court's conclusion that trial counsel made a strategic decision to withdraw the plea of not guilty by reason of mental disease or defect after consulting with a psychiatrist who evaluated Miller for the express purpose of determining whether Miller suffered from a mental disease or defect at the time of the shootings and after also considering the results of evaluations by three other mental-health experts, each of whom concluded that Miller did not meet Alabama's definition of "insanity" at the time of the shootings. "This is precisely the type of strategic choice, based on counsel's examination of the relevant facts and legal principles, that our cases have deemed to be virtually unchallengeable." *Key v. State*, 891 So.2d 353, 376 (Ala. Crim. App. 2002). As the circuit court in *Key* aptly noted:
>
> > [T]he day a lawyer is supposed to come in here and make motions and enter pleas for which he or she has no basis and in fact their education, training, experience, and their

> life's experience and their discussions with their [expert] provide them with no basis and you can say that that's incompetency[,] that's going to be a dark day in our legal system.

891 So.2d at 376.

Miller, 99 So. 3d at 377 (alterations in original).

After reviewing the record, this court finds that the state court's determination was reasonable under *Strickland*. The record reflects that trial counsel considered presenting an insanity defense and retained Dr. Scott for the express purpose of determining whether Miller met the legal definition of insanity at the time of the shootings. However, Dr. Scott determined that Miller did not meet the legal definition of insanity under Alabama law. Dr. Scott's determinations were the same as those of the three other mental health experts who examined Miller prior to the trial. Trial counsel's decision to withdraw the insanity defense after reviewing the opinions of four experts is by no means an unreasonable decision. *See Brownlee v. Haley*, 306 F.3d 1043, 1061 (11th Cir. 2002) (finding that a defense attorney's decision not to pursue an alibi defense he deemed to be implausible and unlikely to succeed to be the type of strategic decision on which a court should defer to the judgment of counsel); *Williams v. Head*, 185 F.3d 1223, 1237 (11th Cir. 1999) ("[T]o

be effective a lawyer is not required to pursue every path until it bears fruit or until all hope withers.")(internal quotations omitted).

Further, as highlighted by the court, Miller cannot demonstrate any prejudice resulting from trial counsel's decision to withdraw the insanity defense. Miller failed to produce a single expert willing to testify that he was legally insane at the time of the shootings. No evidence was ever presented that would demonstrate that Miller met the legal definition of insanity at the time of the murders. Thus, the court finds no reasonable probability that the jury would have found Miller to be legally insane, and he cannot show a reasonable probability that the outcome of the proceeding would have been different but for trial counsel's decision to withdraw the insanity defense.

Within Miller's claim that trial counsel was ineffective for failing to present an insanity defense, Miller alleges that trial counsel was ineffective for failing to provide Dr. Scott with various documents that Miller claims were necessary to determine Miller's sanity. Miller contends that trial counsel should have provided Dr. Scott with the following: (1) a file created by Dr. Hooper following his evaluation of Miller; (2) Dr. McClaren's report of his evaluation of Miller; (3) the recording of Miller's post-arrest police interrogation; (4) records of Miller's medical/psychological

records and those of his family; and (5) information concerning the abuse Miller suffered at the hands of his father. (Doc. 1, 48-66).

The Rule 32 court rejected this argument and found that Miller failed to show that trial counsel was deficient or that Miller suffered any prejudice as a result. (C.R. Vol. 43, Tab 75, at 59–73). Although the Rule 32 court and the Alabama Court of Criminal Appeals discussed the performance prong of *Strickland* at length in relation to this ineffective assistance of trial counsel claim, this court will limit its discussion of the claim to the prejudice prong, since Miller clearly failed to meet this prong. *See Duren v. Hopper*, 161 F.3d 655, 660 (11th Cir. 1998) ("[I]f a defendant cannot satisfy the prejudice prong, the court need not address the performance prong.").

In discussing the prejudice prong, the Rule 32 court stated:

> Miller has failed to demonstrate a reasonable probability that the outcome of his proceeding would have been different had his trial counsel investigated more mental health evidence because he has failed to prove that he met the legal definition of insanity under Ala. Code § 15-16-1. None of the five psychological and psychiatric experts who evaluated Miller during the course of his trial or his Rule 32 proceedings, including Drs. Hooper, Scott, McDermott, McClaren, and Boyer concluded that Miller was legally insane. Therefore, even if trial counsel had conducted a more thorough mental health investigation, the result would be the same: Miller could not have proven that he did not appreciate the wrongfulness of his actions and thus could not have sustained a not-guilty by reason of insanity defense.
>
> Miller's failure to demonstrate prejudice is highlighted by the testimony of Miller's own expert, Dr. Boyer, during the evidentiary

hearing. Despite her opinion that Miller suffered from post-traumatic stress disorder, incredibly, Dr. Boyer failed to testify that Miller was legally insane. (Rule 32 R. 757–58) Notably, Dr. Boyer failed to even provide an opinion. Clearly evading the issue of Miller's sanity, in response to a question regarding whether she disagreed with Dr. Scott's testimony during trial that Miller was not insane, Dr. Boyer testified "I really don't know if I can answer it." (Rule 32 R. 757)

As Dr. Boyer stated in response to a question from counsel for the State, if she had been called to testify on Miller's behalf during trial, she would have had no opinion as to whether he could appreciate the wrongfulness of his conduct at the time of the shootings:

> Q: So in this case it's fair to say that had you been there you would have said I have no opinion [as to Miller's sanity] one way or the other?
>
> A: Yes.

(Rule 32 R. 758) Without offering an opinion, let alone an opinion that conflicted with the evaluations performed during trial, even if a mental health investigation was performed in the manner in which Miller now alleges it should have been conducted, Miller has failed to demonstrate a reasonable probability that additional mental health evidence would have been uncovered that would have affected the outcome of his trial. It is also significant that Dr. Scott failed to state during the evidentiary hearing that his opinion that Miller was not insane at the time of the shootings had changed. No evidence has been presented that Miller was legally insane and ample mental health evidence was already available for trial counsel to effectively argue during the penalty phase that Miller satisfied the requirements for the statutory mitigating circumstances under Ala.Code §§ 13A–5–51(2), (6).

Three psychologists and one psychiatrist evaluated Miller at the time of trial; none of these four doctors, whether hired by the defense or appointed by the trial court, found that Miller was insane. (Rule 32 R. 248) Miller has offered nothing in the testimony of either Dr. Boyer or

> Dr. Scott to call these evaluations into question. There is no evidence that Dr. Boyer's testimony would have benefitted Miller's defense, nor would it have impacted the outcome of the proceedings. Miller has failed to meet his burden of proof of demonstrating how he was prejudiced under *Strickland* by his trial counsel's investigation into his mental health. Therefore, Miller cannot demonstrate that his trial counsel's performance in this regard was constitutionally ineffective and thus, this claim is denied.

(C.R. Vol. 43, Tab 75, at 73-76). The Alabama Court of Criminal Appeals affirmed the Rule 32 court's determination:

> The circuit court's findings are supported by the record. As noted above, to have been entitled to relief, Miller not only had to show that his trial counsel rendered deficient performance by not providing the additional information to Dr. Scott for his consideration in assessing Miller's sanity at the time of the offenses, but also had to prove that he was prejudiced as a result of his trial counsel's failure to provide the information to Dr. Scott. The fact that Dr. Scott *might* have changed his conclusion regarding Miller's sanity at the time of the offenses had he received the information is not sufficient to establish the requisite prejudice.

Miller, 99 So. 3d at 385-86.

This court agrees with the state court's conclusion. As noted previously, Miller fails to point to a single expert who determined that he was unable to appreciate the nature and quality or wrongfulness of his acts at the time of the shootings. Dr. Boyer conducted an extensive review of Miller's record, including the items that Miller alleges trial counsel should have provided to Dr. Scott. (Rule 32 R. Vol. 32, Tab 59, at 599-630). Based on her investigation, Dr. Boyer concluded that Miller suffered

from a post-traumatic stress disorder. (*Id*. at 757-58). However, Dr. Boyer refused to testify that Miller was unable to appreciate the nature and quality or wrongfulness of his acts at the time of the shootings. (*Id*. at 757-58). Miller also called Dr. Scott at the Rule 32 hearing, and he likewise, failed to state that he believed Miller was unable to appreciate the nature and quality or wrongfulness of his acts at the time of the shootings. In total, Miller was examined by five different mental health experts in the course of his trial and the Rule 32 proceedings. None of these experts testified that Miller was unable to appreciate the nature and quality or wrongfulness of his acts at the time of the shootings.

Because Miller fails to point to any evidence that he met the legal definition of insanity, he has failed to establish a reasonable probability that the outcome of his trial would have been different had trial counsel provided Dr. Scott with additional evidence and decided not to withdraw the insanity defense. Therefore, Miller has failed to show that his trial counsel was ineffective and cannot show that his appellate counsel was ineffective in presenting this claim on direct appeal.

c) Miller's claim that trial counsel was ineffective for failing to present mental health evidence during the guilt phase of trial

Miller alleges that trial counsel was ineffective for failing to present mental health evidence to the jury that would have allowed them to find that Miller lacked

the *mens rea* required for a conviction of capital murder. (Doc. 1, at 87-90, 138). Miller maintains that trial counsel should have presented Dr. Scott's finding that Miller, although not legally insane, suffered from a mental illness, experienced tunnel vision, and heard "noises" at the time of the first two shootings. Miller argues that had this testimony been presented at the guilt phase of trial, trial counsel could have argued that Miller lacked the necessary *mens rea* to be found guilty of capital murder.

(1) No Procedural Default

Miller properly raised this claim on collateral appeal, and the Alabama Court of Criminal Appeals addressed the claim on the merits. *Miller*, 99 So. 3d at 386-92. Therefore, this court will review the determinations of the state court under AEDPA deference.

(2) Merits

The Rule 32 court rejected Miller's argument that trial counsel should have presented a defense during the guilt phase. The court stated:

> Trial counsel Johnson had reasonable strategic reasons for not presenting evidence during the guilt phase of trial. Johnson testified that his trial strategy focused on presenting the best evidence and testimony that would save Miller's life. (R2. 80.) Based on the facts and circumstances of his case, Johnson determined that his best opportunity and most effective method of presenting such testimony would be during the penalty phase. (R2. 80; Rule 32 R. 219) Part of this strategy also involved gaining credibility and favor with the jury by not presenting

> frivolous arguments during the guilt phase such as challenging the blood spatter expert's testimony. (Rule 32 R. 219–26)
>
> . . . .
>
> As the Court of Criminal Appeals noted, this decision was made "after a thorough investigation of the relevant law and facts of Miller's case' and Johnson's focus on the penalty phase 'was part of his strategy to spare Miller's life." *Miller*, 913 So.2d at 1161 (holding that "[u]nder the circumstances of this case, defense counsel made a well-reasoned decision to focus his efforts on that part of the trial that he believed offered the greatest chance of success. We see no reason to second-guess defense counsel's decisions regarding this strategy."). Miller has failed to offer any proof that this trial strategy was not the product of a reasonably competent attorney.

(C.R. Vol. 43, Tab 75, at 99-102).

The Rule 32 court also held that Miller suffered no prejudice as a result of trial counsel's decision to not present a defense during the guilt phase, reasoning that any argument that Miller lacked the intent to commit capital murder "would have run contrary to the overwhelming evidence indicating Miller's intent to commit murder." (*Id*. at 104-05). In support of this conclusion, the Rule 32 court noted that Miller "specifically sought out two victims, shot them multiple times, proceeded to another location, specifically sought out another victim, and shot him multiple times." (*Id*. at 105-06). Based on the significant amount of evidence supporting Miller's conviction of capital murder, the Rule 32 court found that Miller failed to demonstrate a reasonable probability that the jury would have found him not guilty

of capital murder. (*Id*. at 106). The court, therefore, concluded that Miller failed to establish prejudice under *Strickland*. (*Id*.). The Alabama Court of Criminal Appeals affirmed the lower court's rejection of this claim. *Miller*, 99 So. 3d at 386-92.

This court cannot say that the determination of the Alabama Court of Criminal Appeals as to either prong of the *Strickland* analysis is unreasonable. In this case, trial counsel made a strategic decision not to contest Miller's guilt and to limit Dr. Scott's testimony to the penalty phase portion of the trial. Trial counsel had sound reasoning for adopting this approach. At the Rule 32 hearing, trial counsel Johnson testified that he decided not to present mental health evidence during the guilt phase because he believed it would have had less of an impact on the jury than if it was presented during the penalty phase. (Rule 32 C.R. Vol. 30, at 225). He also testified that he was concerned that contesting Miller's guilt could have appeared to be frivolous to the jury in light of the great weight of the evidence establishing Miller's guilt. (*Id*. at 220). Finally, trial counsel Johnson testified that he believed Dr. Scott's testimony was more valuable at the penalty phase because Dr. Scott would have been allowed to testify more freely and would be subject to a less rigorous cross-examination, and that he chose to limit Dr. Scott's testimony to the penalty phase because much of Dr. Scott's testimony was based on hearsay, which was only admissible during the penalty phase. (Rule 32 C.R. Vol. 31, at 285). Additionally,

trial counsel Blackwood testified that he did not want to raise mental health evidence during the guilt phase because "Shelby County jurors are very tough, they are very solid people, hard working, that don't believe a lot of hullabaloo about these things they can't see. . . . we thought that it would be best presented at the penalty phase." (Rule 32 C.R. Vol 34, at 892-93).

These concerns are all valid. Recognizing that the evidence of his client's guilt was significant, trial counsel made a strategic decision not to pursue the ill-supported argument that Miller was not guilty of capital murder. This strategy was by no means unreasonable. *See Bell v. Cone*, 535 U.S. 685, 702 (2002) (holding that a "tactical decision about which competent lawyers might disagree" does not qualify as objectively unreasonable).

Miller also fails to prove that he was prejudiced as a result of trial counsel's decision to not present any mental health evidence at the guilt phase. Even looking to Dr. Scott's testimony that Miller experienced tunnel vision and heard "noises" during the first two shootings, the evidence fails to establish a reasonable probability that the jury would not have found Miller guilty of capital murder. The evidence in this case establishes that Miller entered Ferguson Enterprises and shot Christopher Yancy and Lee Holdbrooks multiple times at close range. Miller then got into his vehicle, drove to another location, sought out Terry Jarvis and shot Mr. Jarvis

multiple times. Given the factual circumstances of this case, Miller has not shown a reasonable probability that the outcome of the guilt phase would have been different if trial counsel had presented Dr. Scott's testimony during the guilt phase.

Therefore, because Miller's ineffective assistance of trial counsel claim is without merit, he cannot show that his appellate counsel was ineffective in the manner in which they presented this claim in the post-sentencing proceedings.

d) Miller's claim that trial counsel's penalty phase opening statement was ineffective

Miller alleges that trial counsel rendered ineffective assistance during his penalty phase opening statement. (Doc. 1, at 96-101, 138-39). Miller contends that trial counsel "vilified Mr. Miller, undermined the credibility of Dr. Scott, and effectively conceded the only aggravating factor on which the State relied." (*Id*. at 138-39).[24]

(1) No Procedural Default

Miller properly raised this claim on collateral appeal, and the Alabama Court of Criminal Appeals denied the claim on the merits. *Miller*, 99 So. 3d at 415-16. Therefore, this court will review the determinations of the state court under AEDPA deference.

[24] For the full text of trial counsel's opening statement, *see* Section VI(A)(1)(b).

(2) Merits

The Rule 32 court rejected this claim, finding that trial counsel's penalty phase opening statement was an "impassioned plea that the jury spare Miller's life." (C.R. Vol 43, Tab 75, at 120). The Rule 32 court noted that the purpose of trial counsel's opening statement was to convey to the jury that Miller did not deserve the death penalty regardless of whether they thought he was atrocious or not, and that Miller did not deserve death regardless of how the jurors might feel about him. (*Id*. at 118). The court also found that trial counsel attempted to portray Miller as a "'tortured soul' whose delusions drove him to commit a series of horrific acts." (*Id*. at 120). The court concluded that Miller failed to meet his burden of establishing that no reasonable attorney would have pursued this course of action, and that Miller failed to show that the outcome of the penalty phase would have been different but for trial counsel's opening penalty phase statement. (*Id*. at 122).

The Alabama Court of Criminal Appeals affirmed the Rule 32 court's determination:

> Miller contends that had his appellate counsel properly presented and argued this claim in the motion-for-new-trial proceedings and on appeal, he would have been entitled to relief. In arguing this claim, Miller merely rehashes his argument that his trial counsel rendered ineffective assistance in his opening statement at the penalty phase of the trial. The circuit court thoroughly addressed the rationale behind Miller's trial counsel's opening statement, which "was to convey that no

> matter what Miller had done, 'whether [the jury] thought he was atrocious or not' and 'whatever their feelings [were] about Mr. Miller' that Miller did not deserve the death penalty." (C. 2068, citing February 2008 Rule 32 Hearing, R. 151, 156.) The circuit court concluded that Miller failed to prove that his trial counsel's strategy was deficient or that he was prejudiced by his counsel's opening statement. (C. 2067-73.) The circuit court's findings are supported by the record.
>
> Accordingly, it follows that Miller has also failed to prove by a preponderance of the evidence that his appellate counsel were ineffective in the manner in which they presented this claim of ineffective assistance of trial counsel in the post-sentencing proceedings. *Payne*, 791 So.2d at 401.

Miller, 99 So. 3d at 416 (alterations in original).

After reviewing the record, this court finds the state court's determination to be reasonable under *Strickland*. The record reflects that trial counsel argued in his opening statement that Miller should not be put to death regardless of the jurors' personal feelings about Miller. Trial counsel pointed out that Miller's execution could not bring back the lives of his three victims, and that Miller would already receive punishment for his actions by spending the remainder of his life in prison. Contrary to Miller's contentions, trial counsel did not undermine Dr. Scott's credibility, but presented him as a competent, neutral expert. Trial counsel stated that, although Dr. Scott had been hired to determine whether Miller was insane, he ultimately concluded that Miller did not meet the legal definition of insanity. Trial

counsel then previewed to the jury Dr. Scott's testimony that Miller suffered from a mental and emotional disturbance on the day of the shootings.

After reviewing the entirety of trial counsel's opening statement, this court finds that the Alabama Court of Criminal Appeals' determination that Miller failed to establish that trial counsel was ineffective was a reasonable application of *Strickland*. Thus, appellate counsel could not have been ineffective in the manner in which they presented this ineffective assistance of trial counsel claim.

e) Miller's claim that trial counsel failed to adequately investigate and present mitigation evidence during the penalty phase

Miller alleges that trial counsel should have investigated and presented a "veritable mountain of mitigating evidence" during the penalty phase of the trial. (Doc. 1, at 139). In particular, Miller alleges that trial counsel's investigation was ineffective because counsel failed to: 1) adequately interview Miller and his close relatives, and 2) collect Miller's "employment, education, and medical records, and medical records of his numerous family members with documented serious mental illness." (*Id*. at 17). Miller alleges that as a result of this inadequate investigation, trial counsel did not learn about the following evidence:

> (i) the extent of instability, poverty and hardship Mr. Miller suffered in childhood as a result of his father's constant uprooting of the family and erratic employment history; (ii) the well-documented history of mental

> illness that traced back through at least four generations of the Miller family; (iii) the extreme physical and psychological abuse Ivan [Miller's father] inflicted on the family, including the particular wrath he reserved for Mr. Miller; (iv) the criminal behaviors to which Mr. Miller was exposed during his formative years; (v) notwithstanding this adversity, Mr. Miller's strong work ethic and good employment history; (vi) the financial support he provided his family and the loving relationships he had with his brothers, sisters, nieces and nephews; (vii) the radical changes in Mr. Miller's behavior in the days leading up to the shootings; and (viii) Mr. Miller's bizarre behavior at the time of the shootings.

(*Id*. at 24) (alteration added). According to Miller, he would not have been sentenced to death if trial counsel had presented this mitigating evidence during the penalty phase. (*Id*. at 101-08).

(1) No Procedural Default

Miller properly raised this claim on collateral appeal, and the Alabama Court of Criminal Appeals addressed the claim on the merits. *Miller*, 99 So. 3d at 395-415. Therefore, this court will review the determinations of the state court under AEDPA deference.

(2) Merits

This court begins and ends its analysis of this claim with the prejudice prong of *Strickland*. Both Miller's contention that trial counsel failed to conduct an adequate investigation and his contention that trial counsel failed to adequately present mitigating evidence require this court to reweigh the aggravating and

mitigating evidence to determine whether Miller suffered prejudice. *See Brooks v. Comm'r, Ala. Dep't of Corr.*, 719 F.3d 1292, 1301 (11th Cir. 2013). Therefore, this court will address these claims together. Since Miller fails to establish prejudice, this court need not determine whether trial counsel's performance in connection with his investigation and presentation of mitigating evidence was deficient. *See Holladay v. Haley*, 209 F.3d 1242, 1248 (11th Cir. 2000).

"When a [petitioner] challenges a death sentence. . ., the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death." *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1326 (11th Cir. 2013) (alteration in original) (quoting *Strickland*, 466 U.S. at 695). The Alabama Court of Criminal Appeals held that even if Miller had presented all of the additional mitigating evidence he alleges should have been presented, "there would be no change in the result in this case." *Miller*, 99 So. 3d at 415. In reviewing the opinion of the Alabama Court of Criminal Appeals, this court must determine whether a reasonable jurist could conclude that no reasonable probability existed that the totality of Miller's mitigating evidence would have altered the outcome of the penalty phase. *See Cummings v. Sec'y of Dep't of Corr.*, 588 F.3d 1331, 1367 (11th Cir. 2009) ("Given the strength of the . . . aggravating circumstances, the proposed

mitigation evidence must be strong enough to outweigh them, and therefore to raise a reasonable probability that the balance of aggravating and mitigating circumstances did not warrant death."). Thus, this court will compare the evidence elicited during the Rule 32 hearings that Miller alleges should have been presented at trial with the evidence that was actually presented at trial.

(a) The abuse Miller suffered at the hands of his father

Testimony from the Rule 32 hearings showed that Miller suffered extensive abuse at the hands of his father, Ivan. Ivan frequently hit his wife and children for no reason and was especially abusive towards Miller. (Rule 32 C.R. Vol. 32, at 546). Ivan also threatened his children with guns and knives; on one occasion he threatened Miller and his siblings with a gun, telling them that he did not know which of them he wanted to kill. (Rule 32 C.R. Vol. 31, at 405). Ivan was also verbally abusive, calling Miller a "little bastard" and a "little son of a bitch." (*Id*. at 406). He also abused Miller's mother, Barbara, frequently calling her a "fucking whore, a fucking slut, tramp, anything." (*Id*. at 394).

During the penalty phase of the trial, Dr. Scott presented the following testimony to the jury regarding the abuse Miller suffered:

> To try to understand a little bit more about his relationship with his father, I asked [Miller] to describe his dad, what was it like growing

> up with his father. And rather kind of quietly, reluctantly but in a straight forward manner he described him as verbally abusive. I said, give me an example. He would frequently, even at a very young age, say things like you're no good, you'll never amount to nothing, you're a God damn son of a bitch. He was very physically abusive to him, hit him on various areas of his body and he was frequently bullied and left bruises on him.
>
> . . . .
>
> . . . [Miller] described that when he was a junior in high school one time his father came home and had a large butcher knife from the kitchen and began lounging [sic] at him and he would say things like, it's only God's will that is keeping me from cutting you now.
>
> . . . .
>
> His father was also described as very verbally abusive to his mom, frequently called her a whore. And he witnessed his father physically abusing his mom and hitting her very hard.

(R. Vol. 8, Tab 22, at 1350-51).

(b) Miller's impoverished childhood and exposure to the criminal behavior of his family members

Testimony from the Rule 32 hearings showed that Miller grew up in an impoverished environment and the family lived in a rent-controlled community. (Rule 32 C.R. Vol. 31, at 398-99). Barbara Miller and her children were on welfare, received food stamps, and Barbara's father and brother had to provide necessities to the family. (*Id*. at 415, 460-62). Barbara Miller described the family homes as "junky, rat infested, roach infested, just falling in." (*Id*. at 416). Ivan provided little

support to the family, moving from job to job with periods of unemployment. (*Id*. at 413). He also pawned valuables from the house to pay for drugs. (*Id*. at 414-15). Ivan had a criminal record, was charged with crimes such as murder, grand larceny, robbery, and unlawful flight to avoid prosecution, and was often in and out of jail for "drunken disorderly conduct." (*Id*. at 420-21). As a child, Miller observed his father and uncles using marijuana, cocaine, and intravenous drugs. (*Id*. at 419-20).

At the penalty phase of trial, Dr. Scott presented testimony relating to the poverty Miller suffered as a child. Dr. Scott testified that Ivan frequently quit jobs and that the family was often on the "edge of poverty." (R. Vol. 8, Tab 22, at 1349). He also stated that at one point, Miller "actually quit the eleventh grade" to support the family since his father was not working at the time and the family needed to pay the bills. (*Id*. at 1349-50). Additionally, Dr. Scott testified that Ivan "abused marijuana quite heavily," and that on one occasion, Miller witnessed his father inject a substance into his arm intravenously. (*Id*. at 1350).

(c) The Miller family history of mental illness

During the Rule 32 hearings, Miller presented evidence that numerous members of his family suffered from mental illness, including his great-grandmother, his grandfather, and two of Miller's uncles. (Rule 32 C.R. Vol. 32, Tab 59, at 644-54). Ivan Miller, although not diagnosed with a mental illness, was often suspicious

that people were plotting again him. (Rule 32 C.R. Vol. 31, Tab 59, at 403). Ivan accused his wife of having extra-marital affairs, and believed that she had tried to poison him. (*Id*. at 392-93, 403). He also believed that he had the power to heal, often trying to "heal" his children's illnesses. (*Id*. at 410-11; C.R. Vol. 32, at 549). Ivan Miller also told his children that God had told him to kill them, but he hoped God would tell him to stop. (C.R. Vol. 32, at 550-51).

At the penalty phase of trial, Dr. Scott presented testimony regarding the history of mental illness present in Miller's family. Dr. Scott testified that, although Ivan had "never had a psychiatric evaluation or diagnosis," he had some "unusual behaviors," including the belief that Miller's mother had tried to poison him, and the suspicion that "people around the neighborhood were spying on him." (R. Vol. 8, Tab 22, at 1362). Additionally, Dr. Scott testified that Miller's grandfather was committed to a psychiatric institution and that Miller's younger brother, Richard, was "slow." (*Id*. at 1363). Dr. Scott also told the jury that Ivan Miller had an "interesting" take on religion:

> In some ways [Miller's] father was a preacher of sorts and he would say that he had the power to heal, for example. [Miller] described his – one of his brothers had psoriasis and his father would go and lay hands on him and when the brother didn't heal, [Ivan] would tell the brother he was the devil. And oftentimes [Ivan] would walk around the home sort of spraying holy water around the house.

(*Id*. at 1350-51).

(d) Miller's good employment history and relationship with his family

The evidence presented during the Rule 32 hearings showed that Miller was a hard worker who went to work at an early age to support his family, and typically only left a job when he found a better paying position. (Rule 32 C.R. Vol. 31, at 424; Rule 32 C.R. Vol. 32, at 560). The evidence also showed that Miller had a close relationship with his siblings and provided financial assistance when a family member was in need. (Rule 32 C.R. Vol. 32, at 511, 560). Miller had a strong relationship with his niece, Alicia Sanford, and his nephew, Jake Connell. Alicia Sanford testified that she considered Miller to be like a father to her, and felt that he had raised her. (*Id*. at 474-75). Jake Connell testified that he spent a great deal of time around Miller, who was like an older brother to him. (*Id*. at 579).

Regarding Miller's employment history, Dr. Scott testified that "prior to this episode," Miller had been fired from a couple of jobs for fighting at work, but he usually left jobs to take a better paying position elsewhere. (R. Vol. 8, Tab 22, at 1363). Dr. Scott's testimony relating to Miller's relationship with his family members was limited to discussing Miller's strong relationship with his mother. (*Id*. at 1351-52).

(e) Miller's behavior prior to the shootings

At the Rule 32 hearing, Miller's niece, Alicia Sanford, testified that in the weeks leading up to the shooting, Miller let his beard grow long, complained of ringing in his ears, and often seemed to be daydreaming. (Rule 32 C.R. Vol. 32, at 511-13, 562). She further testified that during this time he was "taking Goody Powders like something crazy" for his more frequent headaches. (*Id.*).

Dr. Scott did not present testimony at trial related to any of these specific facts.

(f) Miller's behavior on the day of the shootings

Although Miller alleges that trial counsel should have presented additional evidence related to Miller's behavior on the day of the shootings, he does not point to any new information in his petition that was not addressed by Dr. Scott in his penalty phase testimony.

(3) Prejudice analysis

After comparing the evidence that was presented at the Rule 32 hearings with the evidence actually presented at trial, this court finds that a reasonable jurist could conclude that no reasonable probability suggested the outcome of the penalty phase would have been different if the additional mitigating evidence had been presented. The only additional information that could have been presented at trial was additional instances of abuse Miller suffered, additional information relating to the history of

mental illness present in some of Miller's extended family members, additional evidence relating to Miller's employment history (including that he had been fired numerous times), and additional information relating to Miller's close relationship with his family. Because Dr. Scott, in his penalty phase testimony, presented similar information regarding Miller's background, those additional accounts would have been merely cumulative of the testimony already presented, and insufficient to establish prejudice. *See, e.g., Rose v. McNeil*, 634 F.3d 1224, 1243 (11th Cir. 2011) ("Obviously, a petitioner cannot satisfy the prejudice prong of the *Strickland* test with evidence that is merely cumulative of evidence already presented at trial."); *Holsey v. Warden, Georgia Diagnostic Prison*, 694 F.3d 1230, 1260-61 (11th Cir. 2012) (recognizing that "evidence presented in postconviction proceedings is 'cumulative' or 'largely cumulative' to or 'duplicative' of that presented at trial when it tells a more detailed version of the same story told at trial or provides more or better examples or amplifies the themes presented to the jury"); *Boyd v. Allen*, 592 F.3d 1274, 1297-98 (11th Cir. 2010) (finding that much of the evidence presented by the petitioner during postconviction proceedings "was in some measure cumulative" of the trial evidence because "much (although not all) of the 'new' testimony introduced at the post-conviction hearing would *simply have amplified the themes already raised at trial*") (emphasis added).

Furthermore, the value of the additional mitigating evidence Miller alleges should have been presented at trial is minimal when weighed against the brutal nature of Miller's crime. In its order denying Miller's motion for new trial, the trial court provided the following description of the crime in support of its determination that the murders were "especially heinous, atrocious, or cruel":

> On the morning of August 5, 1999, [Miller] shot and killed three men, namely, Christopher Yancy ("Yancy"), age 28 years; Lee Holdbrooks ("Holdbrooks"), age 32; and Terry Jarvis ("Jarvis"), age 39 years. Yancy and Holdbrooks were both shot at one location and thereafter Jarvis was shot at another location. Each of those victims sustained multiple wounds.
>
> Yancy suffered three wounds to his body. It appears the first shot entered his leg and traveled through his groin and into his spine, paralyzing him. He was unable to move, unable to defend himself and was trying to hide from [Miller] under a desk. Yancy had a cell phone an inch or two from his hand, but because of his paralysis was unable to reach it and call for help. Yancy had to have been afraid his life was about to be taken. Moments elapsed. [Miller] appeared to have then stooped under the desk and have made eye contact with Yancy before shooting him twice more causing his death.
>
> Holdbrooks suffered six wounds to his body. [Miller] shot Holdbrooks several times. Holdbrooks crawled down a hallway for about twenty-five feet. Holdbrooks was uncertain whether he would live or die as he crawled down the hallway and quite possibly his life was flashing by in his mind. [Miller] took his gun and within two inches of Holdbrooks' head, pulled the trigger for the sixth and final time, the bullet entering Holdbrooks' head causing him to die in a pool of blood.
>
> Jarvis was shot five times, the last shot being no more than 46 inches away from his body. Before Jarvis was shot, [Miller] had pointed

> a gun at him in the presence of a witness. [Miller] had accused Jarvis of spreading rumors about him which Jarvis had denied. [Miller] shot Jarvis four times in the chest. [Miller] allowed the witness to leave. No one knows at that point what went through Jarvis' mind. Having denied he spread any rumors, he must have wondered why [Miller] had not believed him and as the witness was allowed to leave that maybe there would be no more shooting and his life would be spared. [Miller] then shot Jarvis through his heart ending Jarvis' life.
>
> It appears all three of [Miller's] victims suffered for a while not only physically, but psychologically. In each instance, there appeared to have been hope for life while they were hurting, only to have their fate sealed by a final shot, execution style.
>
> Based upon the facts presented at this trial, these murders were calculated, premeditated and callous, with utter disregard of human life. The taking of these lives was among the worst in the memory of this Court and was well beyond the level of being especially heinous, atrocious or cruel.

(Rule 32 C.R. Vol. 43, Tab 72, at 1-3) (alterations added).

In light of the extensive evidence presented regarding the brutal nature of this crime, the Alabama Court of Criminal Appeals reasonably concluded that no reasonable probability existed that the outcome of the penalty phase would have been different if trial counsel had presented additional mitigating evidence. *See, e.g., Brooks v. Comm'r Ala. Dep't of Corr.*, 719 F.3d 1292, 1302–03) (finding no prejudice from counsel's failure to present evidence showing that defendant was nice, good natured, and nonviolent, in light of the heinousness of the defendant's crime); *Boyd v. Allen*, 592 F.3d 1274, 1303 (11th Cir. 2010) (finding no showing of prejudice

"given the overwhelming power of the aggravating evidence," when compared to the totality of mitigating evidence); *Dill v. Allen*, 488 F.3d 1344, 1360 (11th Cir. 2007) (finding that testimony that defendant was a "good person until he began to use drugs" would not have changed the balance of mitigating and aggravating circumstances or the outcome of the sentencing proceeding). Thus, this ineffective assistance of trial counsel claim lacks merit, and appellate counsel could not be ineffective in the manner in which they presented this claim.

Miller adds that *Daniel v. Comm'r, Ala. Dep't of Corr.*, 822 F.3d 1248, 1255 (11th Cir. 2016) strongly supports his arguments "because the ineffective assistance he received from his Trial Counsel in connection with the penalty phase of his trial is strikingly similar to the ineffective assistance outlined in *Daniel*." (Doc. 44, at 2). In *Daniel*, the petitioner argued that he received ineffective assistance of counsel because of trial counsel's failure to investigate and present mitigation evidence during the penalty phase of his trial. *Daniel*, 822 F.3d at 1254.

Daniel's mother, Carolyn Daniel, the sole witness called by the defense, briefly testified as to "some of the low points" in Daniel's life:

> She told the jury that Mr. Daniel had Attention Deficit Hyperactivity Disorder (ADHD) and dyslexia; that he dropped out of school in the tenth grade; and that Mr. Daniel's biological father died when Mr. Daniel was three. Mrs. Daniel also testified that Mr. Daniel's stepfather, Earnest Western, "abused [him] and I didn't know about it for a long

> time." She described only one specific instance of abuse. When Mr. Daniel was about twelve years old Mrs. Daniel said she left him "[o]ne night" with his stepfather and, when she got home, Mr. Daniel told her "that he had gotten a beating by his stepdad" and that he had blood in his urine. When she took Mr. Daniel to the hospital, "[i]t was discovered that one of his kidneys had been damaged from the beating." As a result, protective services removed Mr. Daniel and his two sisters from the home for about ten months, and Mr. Daniel was placed in a group home. When the family reunited, Mrs. Daniel says Mr. Daniel was "withdrawn" and "always seem[ed] like he was hurting on the inside." Mr. Daniel started drinking beer at about age sixteen, and "on one occasion" Mrs. Daniel found marijuana in his room. Finally, Mrs. Daniel pleaded to the jury for her son's life.

Id. at 1256 (alterations in original). Less than three hours after the penalty phase began, the jury returned a 10-2 verdict for death. *Id*. Following a sentencing hearing, Daniel was sentenced to death by the trial court.[25] *Id*. Daniel's convictions and death sentence were ultimately upheld in the appellate courts. *Daniel v. State*, 906 So. 2d 991 (Ala. Crim. App. 2004), *cert. denied*, *Id.* (Ala. 2005), *cert. denied*, *sub nom. Daniel v. Alabama*, 546 U.S. 405 (2005).

Through new counsel, Daniel timely filed a Rule 32 petition in the trial court. Daniel's second amended petition was accompanied by twenty-one exhibits, "including school, mental health, and social service records, along with other documentary evidence, all in support of Mr. Daniel's allegations that if trial counsel

[25] Daniel's mother and sister testified at the sentencing hearing, asking the court to spare Daniel's life. *Id*.

had conducted even a cursory investigation of his background, they would have discovered compelling mitigating evidence." *Id*. at 1257. The trial court summarily dismissed the petition without allowing any discovery or conducting an evidentiary hearing.[26] *Id*. The Alabama Court of Criminal Appeals affirmed the trial court's summary dismissal of the petition at the pleading stage because Daniel failed to sufficiently and specifically plead his claims under Alabama law. *Id.* at 1258. The Alabama Supreme Court denied certiorari in a summary fashion. *Id*.

Daniel timely filed a petition for a writ of habeas corpus in federal court. *Id*. The petition was accompanied by motions for discovery and an evidentiary hearing. *Id*. The district court denied relief without an evidentiary hearing or discovery, finding that Daniel's claim was properly dismissed for failure to plead the claim with sufficient specificity or failure to state a claim. *Id*. at 1258, 1260.

On appeal, the Eleventh Circuit Court of Appeals first found that Daniel's "second amended Rule 32 petition pleaded more than sufficient specific facts about

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[26] The trial court's order denying the petition stated:

> This Court finds that Petitioner's allegations of ineffective assistance of trial counsel either do not meet the specificity requirements of Rule 32.6(b), raise grounds that were raised at trial in violation of Rule 32.2(a)(3), raise grounds that were raised by Petitioner on direct appeal in violation of Rule 32.2(a)(4), raise grounds which could have been but were not raised on direct appeal in violation of Rule 32.2(a)(5), are without merit, or fail to state an issue of fact or law.

Id. at 1257 n.3.

trial counsel's acts and omissions to show their penalty phase investigation 'fell below an objective standard of reasonableness.'" *Id*. at 1263 (quoting *Strickland*, 466 U.S. at 688).[27] Daniel had alleged that trial counsel had "almost no meaningful contact with him or his family prior to trial," despite Daniel's repeated attempts to contact counsel, including Daniel's bar complaint regarding counsel's lack of contact with him, and that trial counsel also ignored efforts by Daniel's mother and sister to provide counsel with relevant background information. *Id*. at 1263-65. Daniel had also specifically detailed the chronic physical, emotional, and sexual abuse that the jury never heard and that trial counsel could have obtained from Daniel's family. *Id*. at 1265-66. The Court also noted that the information uncovered by counsel during their "cursory investigation" should have alerted counsel to the need for more investigation into Daniel's school records. *Id*. at 1266-67.

Second, the Court found that the second amended Rule 32 petition pleaded sufficient facts to show prejudice under *Strickland*. *Id*. at 1274-77. The Court explained that allegations of Daniel's excruciating life history, that were never presented to the jury, were sufficient to establish a reasonable probability that but for

[27] The Court noted that "'at the pleading stage of Rule 32 proceedings [in Alabama], a Rule 32 petitioner does not have the burden of proving his claims,' *Ford v. State*, 831 So.2d 641, 644 (Ala.Crim.App. 2001), and that facts Mr. Daniel alleged in his Amended Rule 32 petition and supporting exhibits are assumed to be true under Alabama law, *see Ex parte Williams*, 651 So.2d 569, 572-73 (Ala. 1992)." *Id*. at 1261.

counsel's failure to present the evidence to the jury, he would have been sentenced to life without parole instead of death. *Id.*

The Eleventh Circuit Court of Appeals concluded that the Alabama Court of Criminal Appeals' adjudication of the merits of Daniel's ineffective assistance of counsel claim was unreasonable and that the claim should be reviewed *de novo*. *Id.* at 1280. The Court remanded the case to the district court to reconsider Daniel's discovery motion, to conduct an evidentiary hearing on his claim, and to reconsider the merits of the claim *de novo*. *Id.* at 1281-82.

Miller claims that the "ineffective assistance Mr. Miller received from his Trial Counsel in connection with the investigation and presentation of mitigating evidence during the penalty phase of his trial is strikingly similar to the ineffective representation alleged by Mr. Daniel that the Eleventh Circuit found to violate his Constitutional rights." (Doc. 44 at 7). However, as explained above, Miller's case differs from *Daniel* in that Miller's claims were addressed and denied on the merits by the Rule 32 court following a thorough evidentiary hearing at which Miller's witnesses' testimony closely mirrored the testimony the jury heard from Dr. Scott in the penalty phase of Miller's trial. Because the evidence Miller alleges should have

been presented at trial was basically the same evidence the jury heard from Dr. Scott, Miller simply did not suffer the prejudice suffered by the petitioner in *Daniel*.[28]

4. Claim B(v): Miller's Claim that Appellate Counsel was Ineffective for Failing to Raise Other Claims of Ineffective Assistance of Trial Counsel

Miller alleges that appellate counsel were ineffective for failing to raise the following claims of ineffective assistance of trial counsel: (a) trial counsel's ineffective performance during the jury voir dire; (b) trial counsel's ineffective performance in failing to object to the admission of irrelevant and prejudicial testimony and photographs during the guilt phase of trial; (c) trial counsel's ineffective cross-examination of crucial prosecution witnesses; (d) trial counsel's failure to object to misleading portions of the State's guilt phase closing argument; (e) trial counsel's ineffective guilt phase closing argument; (f) trial counsel's failure to request guilt phase jury instructions necessary to protect Miller's rights; (g) trial counsel's reliance on Dr. Scott as the sole mitigation witness during the penalty phase

[28] Miller also contends that *Hardwick v. Sec'y, Fla. Dep't of Corr.*, 803 F.3d 541 (11th Cir. 2015) supports this claim. (Doc. 38). In *Hardwick*, The Eleventh Circuit Court of Appeals held that the petitioner made a showing of ineffective assistance of counsel regarding counsel's investigation in a capital case, when counsel, who presented no mitigating evidence, "was aware of a number of red flags" concerning the defendant's life circumstances yet "did not conduct a life-history investigation or follow up on any leads" or attempt to undertake "even a rudimentary mitigation investigation." 803 F.3d 541, 552-54 (11th Cir. 2015). Unlike the petitioner in *Hardwick*, Miller's jury heard basically the same evidence from Dr. Scott that he contends should have been provided by other witnesses. Thus, as previously discussed, Miller did not suffer the prejudice suffered by the petitioner in *Hardwick*.

of trial; (h) trial counsel's failure to move for a directed verdict based on the state's failure to present comparative evidence necessary for the jury to determine that the killings were "especially heinous, atrocious, or cruel compared to other crimes;" (i) trial counsel's penalty phase closing argument; (j) trial counsel's failure to object to the court's penalty phase jury instructions; (k) trial counsel's failure to request a special verdict form to establish that the jury had unanimously found the sole alleged aggravating circumstance; (l) trial counsel's ineffectiveness at the sentencing hearing; and (m) trial counsel's failure to bring the Supreme Court's decision in *Apprendi v. New Jersey* to the attention of the court prior to the sentencing phase.

The Alabama Court of Criminal Appeals rejected this claim, holding that appellate counsel could not have been deficient for failing to raise these claims because none of Miller's claims of ineffective assistance of trial counsel was meritorious. This court, therefore, will examine the state court's determinations regarding each of Miller's ineffective assistance of trial counsel claims with deference.

(a) Trial Counsel's performance during jury voir dire

Miller claims that appellate counsel should have argued that trial counsel's voir dire was inadequate and that trial counsel was ineffective for failing to ask questions related to the jurors' exposure to media coverage of the trial. Miller also contends

that trial counsel did not effectively ask questions designed to uncover potential bias against Miller.

(1) No Procedural Default

This claim was properly raised on collateral appeal and fully exhausted. Therefore, this court will review the determinations of the state court under AEDPA deference.

(2) Merits

In addressing the underlying ineffective assistance of trial counsel claim, the Rule 32 Court held:

> This Court denies Miller's claim because he has failed to meet his burden of proof of demonstrating that his trial counsel's performance was deficient under *Strickland,* 466 U.S. at 687. Ala. R. Crim. P., 32.7(d). Because of the extensive publicity in this case, Johnson, along with the District Attorney's office, developed a written questionnaire that was provided to the entire jury panel. (Rule 32 R. 236) Within the questionnaire, question # 68 specifically asked the jurors to answer whether they had seen anything about the case in any newspaper. (Rule 32 R. 237) Additional questions were included in the questionnaire to determine whether a particular juror had such strong fixed opinions about the case or could not be fair or impartial as a juror. (Rule 32 R. 238)
>
> Johnson testified that he had an opportunity to review the responses to the questionnaires for all members of the jury panel and that he knew the jurors' responses identifying what they saw in the newspapers about the case. (Rule 32 R. 237-38) During trial, the trial court and counsel for both parties conducted an extensive individual voir dire of the jury panel. (R. 130-763)

As the record indicates, Johnson strategically conducted voir dire to determine whether any juror had a fixed opinion, for any reason, of the case. Johnson alerted the trial court to questions # 68, # 69 and # 70 of the juror questionnaire that pertained to the juror's opinions of the case and implored the trial court to focus its questions on whether the jurors had 'fixed opinions' of the case. (R. 146-47) As a result, the trial court determined that it would examine each juror's response to question # 68 and if the juror indicated they had heard something about the case, the trial court would inquire what the juror heard and whether the juror could set aside what they had heard. (R. 148)

During the evidentiary hearing, Miller's counsel questioned Johnson about specific newspaper articles and then questioned Johnson on whether he asked eight jurors about what they had read about the case in the newspaper. (Rule 32 R. 127–34) However, as the record indicates, as a result of Johnson's effort, during individual voir dire, the trial court noted each of the eight juror's responses to question # 68 indicating that the juror had seen or read something about the case and then asked each juror whether they could set what they had learned aside and base their verdict solely on the evidence presented. (R. 337-38, 345-46, 376-77, 446-47, 449-50, 625-26, 638-39, 666-67) All eight jurors indicated that they could set aside what they had learned and sit as a fair and impartial juror. *Id*.

Therefore, information about the jurors' opinions about the case was brought out during the voir dire and Miller has failed to demonstrate that Johnson's method of conducting voir dire was deficient. Miller has failed to present any evidence that a reasonable attorney would have asked these eight jurors about specific newspaper articles. Furthermore, Miller failed to ask Johnson why he did not strike these eight jurors from the panel, nor did Miller ask any specific question regarding Johnson's strategy for using the defense's peremptory strikes. Therefore, because the record is silent, trial counsel's questioning of the jury panel and the subsequent peremptory strikes is presumed to be reasonable. *See Chandler*, 218 F.3d 1305, 1315 n. 15.

In paragraph 162 of his amended petition, Miller claims that his trial counsel failed to question and remove Juror Gregory Johnson who Miller alleges was biased because Juror Johnson favored the death penalty. (Pet. at 47) However, trial counsel's questioning of Juror Johnson was not deficient and the record directly refutes Miller's claim that Juror Johnson was biased. Juror Johnson stated during voir dire that he could follow the trial court's instructions and listen to the evidence in recommending a sentence in Miller's case. (R. 377-78) Juror Johnson also stated that where it was appropriate under the law and evidence he could vote for either life imprisonment or the death penalty. (R. 378) Furthermore, trial counsel Johnson specifically questioned Juror Johnson about his views on the death penalty and elicited from Juror Johnson that he had no fixed opinions about what an appropriate punishment should be. (R. 387–90) Accordingly, Miller's claim is directly refuted by the record and is denied. *See Gaddy v. State*, 952 So.2d 1149, 1161 (Ala. Crim. App. 2006).

. . . .

This claim is also denied because Miller has utterly failed to meet his burden or proof of demonstrating that he was prejudiced by his trial counsel's performance during voir dire. *See Strickland*, 466 U.S. at 695; Ala. R. Crim. P., 32.7(d). Although Miller claims that trial counsel was ineffective for failing to ask eight of the fourteen jurors seated in his case about what they read or remembered about Miller's case, Miller has failed to present any evidence whatsoever about what these eight jurors actually read or remembered about Miller's case prior to trial. (Rule 32 R. 134) None of the jurors who sat at Miller's trial testified during the evidentiary hearing. Therefore, no evidence was presented that the eight jurors actually read or were exposed to the newspaper articles introduced into evidence by Miller during the evidentiary hearing. (Rule 32 R. 127–34, 289–95) Even if the eight jurors had read these newspaper articles, no evidence was presented that the jurors considered these articles harmful to Miller or that they had fixed opinions about Miller because of these articles.

> There is nothing in the record regarding what the jurors read about Miller's case; accordingly, "[t]he mere fact that some of the jurors that sat for [Miller's] trial had pretrial knowledge of his case is not enough to establish they were biased against him." *Duncan v. State*, 925 So.2d 245, 267 (Ala. Crim. App. 2005). Therefore, because there is no evidence about what the jurors read and whether they were actually biased against Miller because of what they read, Miller has failed to demonstrate that he was prejudiced by this trial counsel's performance during voir dire. Miller's claim is denied.

(C.R. Vol. 43, Tab 75, at 2040-45) (alterations in original).

The Alabama Court of Criminal Appeals affirmed the Rule 32 court's determination that trial counsel was not ineffective:

> The circuit court's findings are supported by the record and Alabama law. As we stated on direct appeal:
>
> > [T]he potential for actual juror prejudice was addressed through voir dire during the selection of the jury. Through the use of juror questionnaires and individual voir dire, any potential jurors who may have had fixed opinions regarding Miller's guilt were excused from service. Nor was there any showing that media coverage created a presumption of actual prejudice. *See Ex parte Travis*, 776 So.2d 874, 879 (Ala. 2000).
>
> *Miller*, 913 So.2d at 1162.
>
> Accordingly, "[b]ecause [Miller] failed to establish that his claim of ineffective assistance of trial counsel is meritorious, he has failed to prove by a preponderance of the evidence that his appellate counsel was ineffective for failing to present this claim." *Payne*, 791 So.2d at 401-02.

Miller, 99 So. 3d at 419 (alterations in original).

The record supports the determinations of the Alabama Court of Criminal Appeals. In examining an attorney's performance during jury selection, this court must begin with the strong presumption that trial counsel acted properly and that his jury selection decisions were sound trial strategy. *See, e.g., Harvey v. Warden, Union Corr. Inst.*, 629 F.3d 1228, 1245 (11th Cir. 2011) (recognizing that trial counsel's actions during voir dire are presumed to be reasonable); *Manning v. State*, 373 F. App'x 933, 935 (11th Cir. 2010) (affirming dismissal of ineffective assistance of counsel claim when counsel failed to strike juror who did in fact express a bias on ground that petition failed to establish prejudice). To overcome this presumption, Miller bears the burden of demonstrating that trial counsel's actions were so unreasonable that no competent attorney would have taken the actions that trial counsel took. *See Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000). Miller cannot meet this burden.

The record reflects that trial counsel took steps to insure that the jurors selected could be fair and impartial. Each potential juror was first required to fill out an extensive juror questionnaire created by trial counsel and the District Attorney's Office. (Rule 32 C.R. Vol. 30, at 236-37). Trial counsel reviewed the jurors' completed questionnaires prior to individual juror voir dire and considered the

information that he learned from the questionnaire in making his decision to strike jurors. (*Id*. at 239-40).

After reviewing the jury questionnaire, trial counsel engaged in the voir dire process. Counsel understood that many of the jurors likely had been exposed to some media coverage. Because of this concern, trial counsel asked the court to focus on whether the specific juror had developed a "fixed opinion" about the case. (C.R. Vol. 2, at 146-48). The court agreed to do so, and stated that it would specifically examine each potential juror on whether the juror had heard anything regarding Miller's case, and if so, whether the juror had formed any opinion as a result. (*Id*. at 148-49).

Although Miller alleges that trial counsel should have asked the jurors additional questions, *Strickland* does not ask whether an attorney could have done more, but only whether the attorney's performance was so unreasonable that no competent attorney would have performed as trial counsel did. *See Chandler*, 218 F.3d 1305, 1313 (11th Cir. 2000) ("To state the obvious: the trial lawyers, in every case, could have done something more or something different. . . . But, the issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.'") (quoting *Burger v. Kemp*, 483 U.S. 776, 794 (1987)). After reviewing the record, this court concludes that no evidence shows that trial

counsel's performance during voir dire was such that no reasonable attorney would have approached voir dire in this manner.

Further, Miller fails to establish the prejudice prong of *Strickland*. To establish prejudice resulting from counsel's performance during voir dire, a petitioner "must show that at least one juror was biased" because "if no juror were biased, then there is no 'reasonable probability that . . . the result of the proceeding would have been different.'" *Owen v. Florida Dep't of Corr.*, 686 F.3d 1181, 1201 (11th Cir. 2012) (quoting *Strickland*, 466 U.S. at 694). All eight of the jurors who were exposed to pretrial publicity were questioned regarding whether they could put aside anything they had learned from the publicity the case received, and all eight jurors responded that they could be impartial.[29] (C.R. Vol. 3, at 337-38, 345-46, 376-77, 446-47, 449-50; C.R. Vol. 4, at 625-26, 638-39, 666-67). Miller fails to offer any evidence that any juror was biased against him. Instead, he simply points out that some of the jurors were exposed to pretrial publicity about the case. However, the mere fact that some jurors were exposed to pretrial publicity about Miller's case does not establish

[29] Juror E.H. indicated in his juror questionnaire that he had formed an opinion as to who was responsible for the deaths of Holdbrooks, Yancy, and Jarvis. (C.R. Vol. 3, at 337). When asked by the court whether he could put aside any pre-existing opinions or impressions and base his decision solely on the evidence presented in court, Juror E.H. responded that he could do so. The Eleventh Circuit has held that "'the mere existence of any preconceived notion [by a juror] as to . . . guilt or innocence, *without more*' is insufficient to establish a claim of prejudicial pretrial publicity." *Devier v. Zant*, 3 F.3d 1445, 1462 (11th Cir. 1993) (alterations in original) (quoting *Irvin v. Dowd*, 366 U.S. 717, 723 (1961).

that any juror was actually *biased* again him. *See Bertolotti v. Dugger*, 883 F.2d 1503, 1521 (11th Cir. 1989) (holding that "if jurors can lay aside preconceptions and base their verdict on the evidence adduced at trial, they need not be completely unaware of the facts of a given case") (citing *Murphy v. Florida*, 421 U.S. 794, 799-800 (1975)).

Based on the lack of evidence demonstrating bias, this court concludes that the state court reasonably determined that trial counsel's performance during voir dire did not prejudice Miller. *See, e.g., Brown v. Jones*, 255 F.3d 1273, 1280 (11th Cir. 2001) (holding that petitioner did not establish prejudice when he failed to adduce any evidence that a juror was biased in favor of the death penalty); *Van Poyck v. Fla. Dep't of Corr.*, 290 F.3d 1318, 1328–29 (11th Cir. 2002) (finding no prejudice when each juror unequivocally stated that he or she could render a verdict based solely on the evidence and instructions given by the trial judge). Likewise, the state court reasonably determined that appellate counsel was not ineffective for failing to present this claim.

b) Miller's claim that trial counsel was ineffective in failing to object to the admission of testimony and photographs during the guilt phase of trial

Miller alleges that appellate counsel should have argued that trial counsel was ineffective for failing to object to gruesome testimony and photographs of the victims

introduced during the testimony of the state's forensic scientists, Dr. Angello Della Manna and Dr. Stephen Pustilnik. (Doc. 1, at 80-87, 143). During the guilt phase of the trial, Dr. Della Manna presented testimony concerning blood patterns at the crime scene. (*Id*. at 81). The state used Dr. Della Manna's testimony to introduce graphic photographs of the victims and the crime scenes. (*Id*.). Similarly, Dr. Pustilnik analyzed photos of the gunshot wounds and testified as to the pain the victims would have suffered prior to death. (*Id*. at 82). Miller argues that the evidence admitted through the testimony of Dr. Della Manna and Dr. Pustilnik was irrelevant to the issue of Miller's guilt and only served to inflame the jury against Miller. (*Id*.).

(1) Procedural Default

The respondent correctly contends that this claim is procedurally defaulted from habeas review because the last state court to review the claim determined that Miller failed to comply with state procedural rules by abandoning the claim in his Rule 32 petition.[30] The Rule 32 court observed:

> Miller failed to present any evidence whatsoever during the evidentiary hearing in pursuit of this claim. In fact, Miller failed to ask trial counsel a single question regarding why trial counsel did not object to certain testimony or allegedly prejudicial photographs. Nor did Miller offer any evidence that would establish that the testimony and photographs of the victims and crime scene were actually irrelevant and inflammatory in

[30] Additionally, the claim is procedurally defaulted because Miller did not raise the claim on appeal from the denial of his Rule 32 petition.

> this case. Therefore, this Court denies this claim because Miller has abandoned the claim.

(C.R. Vol. 43, Tab 75, at 2057) (citing *Brooks v. State*, 929 So. 2d 491, 498 (Ala. Crim. App. 2008) (holding that a Rule 32 petitioner's failure to ask counsel "any questions concerning her reasons for not pursuing any of the claims" in the Rule 32 petition constituted an abandonment of those issues)). *See also, e.g.*, *Hooks v. State*, 21 So. 3d 772, 788 (Ala. Crim. App. 2008) (holding that when an appellant does not present evidence addressing certain claims at an evidentiary hearing on a Rule 32 petition, the state court can conclude that he has abandoned the claims, and is not required to review them). Because the Rule 32 court determined that Miller abandoned this claim, the claim is procedurally defaulted from habeas review. *See Brownlee v. Haley*, 306 F.3d 1043, 1066–67 (11th Cir. 2002) (finding that state court's determination that a claim was abandoned barred federal habeas review).

(2) Merits

Alternatively, even if the claim were properly before this court, it would be due to be denied because it is without merit. Although finding the claim to be procedurally barred, the Rule 32 court went on to find that the claim lacked merit because the testimony and photographs relating to the crime scene were properly

admissible under Alabama law" (C.R. Vol. 43, Tab 75, at 2058-59). The court pointed out that under Alabama law:

> photographs which show external wounds in the body of a deceased victim, even though they are cumulative and based on undisputed matters, are admissible. The fact that they are gruesome is not grounds to exclude them so long as they shed some light on the issues being tried. The fact that a photograph is gruesome and ghastly is no reason to exclude it form evidence, so long as the photograph has some relevancy to the proceedings, even if the photograph may tend to inflame the jury.

(*Id*. at 2058) (quoting *Sneed v. State*, 1 So. 3d 104, 132 (Ala. Crim. App. 2007)). The court found that the "testimony and photographs of both the crime scene as well as the gunshot wounds of the victims were relevant and necessary to prove that Miller intended to kill each victim in this case. (R. 1271-75)." (*Id*.). Therefore, the court concluded that because the evidence would have been admissible notwithstanding an objection by trial counsel, counsel could not be ineffective for failing to make such an objection. (*Id*. at 2058-59).

This court agrees with the state court's reasoning. Because counsel had no basis for objecting to the admission of the photographs and testimony under Alabama law, trial counsel could not have been ineffective for failing to object. *See Chandler v. Moore*, 240 F.3d 907, 917 (11th Cir. 2001) (holding that counsel was not ineffective for failing to raise a non-meritorious objection). Because an objection

would not have succeeded, Miller was not prejudiced by trial counsel's failure to object. Therefore, this ineffective assistance of trial counsel claim is without merit, and appellate counsel was not ineffective for failing to raise it.

c) Miller's claim that trial counsel conducted an ineffective cross-examination of crucial prosecution witnesses

Miller alleges that appellate counsel should have argued that trial counsel was ineffective for failing to effectively cross-examine crucial prosecution witnesses. (Doc. 1, at 83-87, 144). Specifically, Miller argues that trial counsel should have cross-examined: (1) Dr. Angello Della Manna; (2) Dr. Steven Pustilnik regarding his foundation for asserting that the victims felt severe pain as result of the gunshot wounds they suffered; (3) Johnny Cobb regarding the fact that neither Holdbrooks nor Yancy had been spreading rumors about Miller; (4) David Andrew Adderhold regarding, the fact that Miller allowed Adderhold to leave the scene of the shootings unharmed, and Miller's good work performance at Post Airgas prior to the shootings; and (5) Sergeant Stuart Davidson regarding the fact that Miller did not attempt to escape during the lengthy time period that police pursued him down the interstate after he committed the shootings. (*Id*.).

(1) Procedural Default

Respondent correctly contends that this claim is procedurally defaulted because the state court determined that Miller abandoned the claim. (Doc. 16, at 96-100). The Rule 32 court observed that Miller failed to present any evidence whatsoever in pursuit of this claim during the evidentiary hearing. (C.R. Vol. 43, Tab 75, at 2059). The court noted that Miller failed to ask trial counsel a single question regarding his strategy in cross-examining the prosecution's witnesses, failed to identify any specific questions trial counsel could have asked each witness or elicited during cross-examination, and failed to offer any evidence as to how he was prejudiced by trial counsel's lack of a cross-examination of the state's witnesses. (*Id*.). The court concluded that Miller had abandoned the claim. (*Id*. at 2059-60). The Alabama Court of Criminal Appeals followed suit, declining to review the claim because Miller had abandoned it. *Miller*, 99 So. 3d at 425.

As discussed previously, the state court's determination that a petitioner abandoned a claim on appeal bars habeas review. *See Brownlee v. Haley*, 306 F.3d 1043, 1066-67 (11th Cir. 2002). Thus, to the extent that Miller alleges that appellate counsel was ineffective for failing to assert that trial counsel was ineffective in the manner in which he cross-examined the state's witnesses, the claim is procedurally barred from review in this court.

(2) Merits

Additionally, even if the claim were not procedurally barred, it would be due to be denied on the merits. The record reflects that during the hearing on the motion for new trial, Miller questioned trial counsel regarding his performance in cross-examining the state's witnesses. (C.R. Vol. 9, Tab 30, at 40-46). However, Miller only asked trial counsel about his decision not to cross-examine Dr. Della Manna, and his decision not to question Dr. Pustilnik about Dr. Pustilnik's testimony that Miller shot Holdbrooks at close range. (*Id.*).

When asked about his decision to not cross-examine Dr. Della Manna, trial counsel stated that he believed Dr. Della Manna's testimony was frivolous, and that the best approach to countering Dr. Della Manna's testimony was to "mock" his testimony before the jury in trial counsel's closing statement. (*Id.* at 41). When asked about his decision not to challenge Dr. Pustilnik's testimony regarding the distance from which Miller shot Holdbrooks, trial counsel stated that he believed the important thing to the jury was that Miller shot Holdbrooks a second time while Holdbrooks was struggling for his life, not the distance from which Miller fired the final shot.[31] (*Id*. at 43-45).

[31] Appellate counsel could not remember Holdbrooks' name during his questioning of trial counsel, instead referring to him as "the gentleman that was crawling up the hall." (C.R. Vol. 9, Tab 30, at 42).

Thus, to the extent that Miller questioned trial counsel about his performance in connection with cross-examination, the record reflects that trial counsel made a strategic decision to limit his cross-examination of the state's witnesses. Additionally, because the record is silent as to trial counsel's strategy in not questioning the remainder of the state's witnesses, this court must assume that trial counsel had sound reasons for limiting his cross-examination of them. *See Chandler v. United States*, 218 F.3d 1305, 1314 n.15 (11th Cir. 2000) ("An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption [of effective representation.]").

Finally, the claim is due to be denied because Miller cannot show any resulting prejudice. Considering the overwhelming evidence of Miller's guilt, it is unlikely that cross-examination of these witnesses could have overcome that evidence. *See Waters v. Thomas*, 46 F.3d 1506, 1510 (11th Cir. 1995). Because this ineffective assistance of trial counsel claim is without merit, appellate counsel cannot be ineffective for failing to raise it.

d) Miller's claim that trial counsel was ineffective for failing to object to portions of the state's guilt phase closing argument

Miller alleges that his appellate counsel should have argued that trial counsel was ineffective for failing to object to the prosecution's statements in the guilt phase

closing argument, that Miller made eye contact with Yancy and Holdbrooks at the time that he fatally shot each of them. (Doc. 1, at 90).

(1) Procedural Default

Respondent again contends that this claim is procedurally barred because the Rule 32 court found the claim to be abandoned. (Doc. 16, at 96-100). Respondent is again correct. The Rule 32 court observed that Miller failed to present any evidence regarding this claim at the Rule 32 hearings:

> Miller failed to ask trial counsel a single question regarding why [trial counsel] did not object to the prosecution's closing argument. During the evidentiary hearing, Miller did not identify any specific statement made by the prosecutor in closing arguments to which Miller should have objected. Miller did not ask what trial counsel's strategy was during the prosecution's closing arguments. Nor did Miller offer any evidence that would establish how he was prejudiced by his trial counsel's decision not to object.

(C.R. Vol. 43, Tab 75, at 2064-65). The Rule 32 court found that Miller had abandoned the claim. (*Id*. at 2065). Therefore, habeas review of this claim is barred.[32]

(2) Merits

Alternatively, this claim would also be due to be dismissed on the merits because, even assuming that the state's guilt phase argument was improper, Miller

[32] Additionally, the claim is procedurally defaulted because Miller did not raise the claim on appeal from the denial of his Rule 32 petition.

fails to allege any prejudice stemming from trial counsel's decision not to object. Indeed, Miller cannot establish any resulting prejudice as the outcome of the guilt phase would not have been different even if trial counsel had objected to the state's closing argument. Because Miller cannot show the requisite prejudice to establish his underlying ineffective assistance of trial counsel claim, he cannot show prejudice resulting from appellate counsel's failure to present this claim.

e) Miller's claim that trial counsel was ineffective in his guilt phase closing argument

Miller alleges that his appellate counsel should have argued that his trial counsel was ineffective in his guilt phase closing argument. (Doc. 1, at 143). Specifically, Miller contends that his trial counsel was ineffective for failing to argue that Miller lacked the *mens rea* to commit capital murder, for essentially conceding that Miller was responsible for the killings, and for distancing himself from Miller by stating that he was not proud to represent Miller. (*Id*. at 91-92).

(1) No Procedural Default

This claim was properly raised on collateral appeal and fully exhausted. Therefore, this court will review the state court's decision under AEDPA deference.

(2) Merits

In denying this claim, the Rule 32 court held:

This Court denies Miller's claim because he has failed to meet his burden of proof of demonstrating that his trial counsel's performance was deficient under *Strickland*, 466 U.S. at 687. Ala. R. Crim. P., 32.7(d). Johnson's closing argument was reasonable based both on the tactical decision to focus on the penalty phase of trial and his overall strategy of not presenting frivolous arguments in order to win credibility with the jury. (R. 1261-64) As noted above, Johnson continually testified that he strategically chose to focus on the penalty phase of Miller's trial in order to save Miller's life. (R2. 80, Rule 32 R. 219) In an attempt to bolster his chances of success during the penalty phase, Johnson made a tactical decision to emphasize to the jury that he would not be presenting frivolous evidence or arguments during the guilt phase. (Rule 32 R. 143, 219)

Similar to his comments during opening statements, Johnson echoed to the jury during closing arguments that he was not going to present a frivolous defense such as arguing a second gunman existed or challenging the fact that the prosecution could not match the bullets taken from the victims to Miller's gun. (R. 1261–62) Johnson reminded the jury of the State's burden and implored the jury to listen to the judge's instructions on the law and render a verdict based on the facts and consistent with their oath. (R. 1263) Miller has failed to present any evidence which would establish that [Johnson's] continual effort during closing arguments to gain credibility with the jury in order to make an effective penalty phase argument was unreasonable.

Johnson's decision to not argue that Miller did not have intent to commit capital murder during closing arguments was consistent with his overall trial strategy of focusing on the penalty phase of the trial. (Rule 32 R. 219) Moreover, Johnson's comments about his representation of Miller were consistent with this strategy as well. Johnson told the jury that he was proud of his representation of Miller, but in an effort to win favor with the jury, also stated he was still not proud of what happened during the shootings:

> And I at least am proud at this point that I have participated in this. It does not remove any degree the shame of what

> happened. It does not make me proud that I'm representing someone who the evidence is fairly convincing, I must concede to you, did what he did.

(R. 1263-64) During the evidentiary hearing, Johnson explained that this statement could not be viewed in isolation, but as part of a larger goal of not alienating the jury during the guilt phase to attempt to win favor with the jury. (Rule 32 R. 142-43)

When viewed in the context of Johnson's entire trial strategy, Johnson's closing argument was reasonable attempt to gain credibility with the jury during the guilt phase in order to attempt to get a favorable result in the penalty phase – the focus of Johnson's strategy. Based on this approach, Miller has failed to demonstrate that trial counsel's decision was unreasonable or that his performance during closing arguments was deficient under *Strickland*. Therefore, this claim is denied.

This claim is also denied because Miller failed to meet his burden of proof of demonstrating that he was prejudiced by his trial counsel's closing argument. *See Strickland*, 466 U.S. at 695; Ala. R. Crim. P; 32.7(d). Miller has presented no evidence concerning the impact of Johnson's statements on the jury, nor has Miller demonstrated a reasonable probability that the outcome of the guilt phase of his trial would have been different had Johnson not conducted his closing argument in this manner. In general, statements of counsel "are usually valued by the jury at their true worth and are not expected to become factors in the formation of the verdict." *Minor*, 914 So.2d at 417. Miller offered nothing more in support of his claim of ineffectiveness than the bare, conclusory allegation that Johnson's closing argument was improper and that it prejudiced the jury, without proving specific facts that demonstrate prejudice. Accordingly, Miller has not met his burden of demonstrating prejudice under *Strickland* and therefore, this claim is denied.

(C.R. Vol. 43, Tab 75, at 2061-2064).

The Alabama Court of Criminal Appeals affirmed the Rule 32 court's ruling, holding that "[b]ecause [Miller] failed to establish that his ineffective-assistance-of-trial-counsel claim is meritorious, he has failed to prove by a preponderance of the evidence that his appellate counsel was ineffective for failing to present this claim." *Miller*, 99 So. 3d at 421 (alterations in original)(internal citation omitted).

After reviewing the record, this court concludes that the state court's determination was reasonable. Trial counsel's guilt phase closing argument was consistent with trial counsel's overall strategy of maintaining credibility with the jury for the penalty phase of trial. This court has already stated that this approach to trying the case was not unreasonable, and Miller fails to demonstrate that trial counsel's performance was a professionally unreasonable error under *Strickland*.

Moreover, as the Rule 32 court found, Miller failed to demonstrate that the outcome of the proceeding would have been different but for trial counsel's closing statement. The evidence of Miller's guilt is overwhelming, and he has offered nothing to establish a reasonable probability that the outcome of the proceeding would have been different but for trial counsel's statement.

Because the underlying ineffective assistance of trial counsel claim is not meritorious, appellate counsel could not have been ineffective for failing to raise the

claim. Therefore, the state court's determination was reasonable, and Miller is not entitled to habeas relief.

f) Miller's claim that trial counsel was ineffective for failing to request jury instructions to protect Miller's rights

Miller claims that appellate counsel should have argued that trial counsel was ineffective for requesting certain jury instructions and failing to request others. (Doc. 1, 92-94, 144). First, Miller faults trial counsel for requesting that the court instruct the jury that even if a defendant pleads guilty to capital murder, the state must prove the defendant's guilt beyond a reasonable doubt. (*Id*. at 93). Miller contends that this instruction implied that Miller was not contesting his guilt of capital murder. (*Id*.). Next, Miller argues that trial counsel was ineffective for asking the court not to instruct the jury on the impermissibility of drawing an adverse inference from Miller's decision not to take the stand. (*Id*.). Miller argues that the court's failure to provide this instruction would also have misled the jury into believing that Miller was not contesting his guilt. (*Id*.). Finally, Miller argues that trial counsel was ineffective for failing to request a clarifying instruction on the heightened *mens rea* requirement for the offense of capital murder, which Miller argues was necessary for the court to distinguish between capital and non-capital intentional murder. (*Id*.).

(1) Procedural Default

The Rule 32 court denied this claim, holding that Miller had abandoned this claim because he failed to present any evidence relating to this claim during the Rule 32 hearings. (C.R. Vol. 43, Tab 75, at 2066-67). The Alabama Court of Criminal Appeals also denied the claim because Miller failed to comply with state procedural rules. *Miller*, 99 So. 3d at 425. Therefore, this court finds that this claim is barred from habeas review. *See Brownlee v. Haley*, 306 F.3d 1043, 1066-67 (11th Cir. 2002).

(2) Merits

Even assuming this claim is not procedurally defaulted, and reviewing the claims *de novo*, Miller still has failed to demonstrate that he is entitled to habeas relief because he has failed to produce evidence sufficient to meet either prong of *Strickland*. As the Rule 32 court pointed out, Miller failed to present any evidence at the Rule 32 hearing regarding trial counsel's strategy in requesting or failing to request specific jury instructions, and did not identify any specific instructions he believes counsel should have requested. (C.R. Vol. 43, Tab 75, at 2066). A silent record as to an attorney's motives for taking a particular action is insufficient to overcome the presumption that the attorney had good reasons for acting as he did. *See Massaro v. United States*, 538 U.S. 500, 505 (2003) ("The appellate court may

have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse."). Thus, this court must assume that trial counsel pursued a reasonable strategy in the absence of any evidence to the contrary.

Additionally, Miller fails to demonstrate a reasonable probability that the outcome of the proceeding would have been different but for trial counsel's strategy in proposing jury instructions. The jury instructions clearly stated that Miller was not pleading guilty to the charged offenses and that the jury was required to determine Miller's guilt beyond a reasonable doubt. The court provided the following instruction:

> *Now, to the charge of capital murder, the defendant has entered a plea of not guilty. And, of course, that applies to the charge of capital murder and any lesser included offenses.*
>
> *The plea of not guilty* casts the burden of proof on the State of Alabama to convince you, the jury, beyond a reasonable doubt . . . that the defendant is guilty as charged in the indictment.
>
> The defendant does not have a burden of proof whatsoever. He does not have to prove that he's innocent. He comes in to court with the presumption of innocence which surrounds him throughout the trial in this case and attends him or goes with him into the jury room until the jury and each and every member of the jury, after considering all the evidence, are convinced beyond a reasonable doubt that the defendant is guilty as charged in the indictment. And then at that time, and at that time only, does eh shed that presumption of innocence, sometimes called a cloak of innocence.

(C.R. Vol. 7, Tab 16, at 1287-88) (emphasis added).

The court also distinguished between the elements of capital murder and the elements of the lesser offense of intentional murder:

> Now, in order to find the defendant guilty of this lesser included offense of intentional murder, you must find the defendant committed an intentional murder of only one person or that, should you find an intentional murder or two or more persons, that the state failed to prove beyond a reasonable doubt that the murders of two or more persons were not - - were pursuant to one scheme or course of conduct.
>
> Now, if you find from the evidence the state has proved beyond a reasonable doubt each of the above elements of the offense of murder as charged, then you shall find the defendant guilty of murder, a lesser included offense of capital murder.
>
> If you find the state has failed to prove beyond a reasonable doubt any one or more of the elements of the offense of intentional murder, then you cannot find the defendant guilty of intentional murder.
>
> Now, to the charge of capital murder, the defendant has entered a plea of not guilty. And, of course, that applies to the charge of capital murder and any lesser included offenses.

(*Id*. at 1286-87). Thus, the court's guilt phase jury instructions sufficiently informed the jury that Miller was not pleading guilty and provided the jury with the necessary information to differentiate between capital and non-capital murder. Because the court correctly instructed the jury, and the jury still found Miller guilty, this court finds that Miller would not be entitled to habeas relief even if his claim were not procedurally defaulted.

g) Miller's claim that trial counsel was ineffective for relying on Dr. Scott as the sole mitigation witness during the penalty phase of trial

Miller contends that appellate counsel should have argued that trial counsel was ineffective for relying solely on Dr. Scott during the penalty phase. (Doc. 1, at 144). Miller first argues that Dr. Scott's testimony was insufficient because he was not hired as a mitigation expert and had not conducted a sufficient investigation to present the full range of evidence that a mitigation expert would be expected to present at trial.[33] (*Id.* at 101). Next, Miller argues that trial counsel was deficient for failing to call several members of Miller's family, including "Mr. Miller's mother, Barbara Miller, half-sister, Cheryl Ellison, half-brother, Jeff Carr, Jeff's wife, Sandra Carr, Barbara's brother, George Carr, aunt Hazel Miller, and cousin, Cindy Carr . . . Mr. Miller's brother, Richard Miller, niece, Alicia Sanford, nephew, Jacob Connell, and cousin Brian Miller." (*Id*. at 106). Miller contends that as a result of trial counsel's decision to present only Dr. Scott's testimony during the penalty phase, the jury never heard evidence of Miller's character and upbringing, the extent of physical

[33] Trial counsel did not employ Dr. Scott to put on a mitigation case. Instead, Dr. Scott was hired for the purpose of establishing two mitigating factors under Alabama law – first, that Miller was under the influence of an extreme mental or emotional disturbance at the time of the shootings, and second, that Miller's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. (R. Vol. 9, Tab 30, at 18).

abuse he suffered, his positive work history, his good character, and his positive relationships with family members.

(1) No Procedural Default

Respondent contends that this claim is not properly exhausted because Miller never argued that trial counsel was ineffective for relying on Dr. Scott as the sole mitigation witness. (Doc. 16). However, after reviewing the record, this court finds that Miller did raise this claim in his Rule 32 petition, as well as on appeal to the Alabama Court of Criminal Appeals. (Rule 32 C.R. Vol. 21, at 443-51; Rule 32 R. Vol. 38, Tab 63, at 82-104). Thus, this court will review the state court's rejection of this claim under AEDPA deference.

(2) Merits

In discussing this claim, the Rule 32 court addressed both the prejudice and performance prongs of *Strickland*, and the Alabama Court of Criminal Appeals affirmed the trial court's reasoning as to both prongs. However, because lack of prejudice is clear, this court will limit its analysis to the prejudice prong. The Rule 32 court found that Miller failed to establish prejudice because the evidence that Miller alleges should have been presented through Miller's family members or through a mitigation expert would simply be cumulative of the evidence presented by Dr. Scott and would have been insufficient to establish any other mitigating factor.

(C.R. Vol. 43, Tab 75, at 2085-95). The court concluded by stating that Miller failed to show that the admission of additional mitigating evidence would have altered the outcome of the proceeding in light of "the brutal nature of the crime, the overwhelming and convincing evidence of guilt, and the strength of the aggravating circumstance that [the murders were] heinous, atrocious, and cruel." (*Id*. at 2096).

As discussed by this court in Part VI(B)(3)(e), Miller cannot show a reasonable probability that the admission of additional mitigating evidence would have altered the court's decision to sentence Miller to death. Therefore, regardless of whether trial counsel acted unreasonably in only calling Dr. Scott to testify during the penalty phase, Miller cannot establish prejudice. *See Crawford v. Head*, 311 F.3d 1288, 1322 (11th Cir. 2002) (holding that even if trial counsel acted unreasonably, petitioner was not entitled to habeas relief because no reasonable probability existed that additional mitigating evidence would have led the jury to sentence the petitioner to life rather than death). Accordingly, the state court reasonably determined that Miller's trial counsel was not ineffective, and, therefore, the state court reasonably determined that Miller's ineffective assistance of appellate counsel claim was also without merit.

h) Miller's claim that trial counsel was ineffective in failing to move for a directed verdict during the penalty phase

Miller alleges that appellate counsel should have argued that trial counsel was ineffective for failing to move for a directed verdict based on the state's failure to

present comparative evidence necessary for the jury to determine that the killings were "especially heinous, atrocious, or cruel compared to other capital crimes." (Doc. 1, at 144). Miller argues that by its very terms, the "especially heinous, atrocious or cruel" aggravating factor requires the jury to compare the heinousness of the crime with the heinousness of "other capital offenses." (*Id*. at 109). He explains that:

> The jurors would have no way of performing such a comparison without receiving and evaluating evidence concerning the heinousness, atrocity, and cruelty of "other capital offenses." This aggravating factor, by its very terms, is not satisfied if the jurors simply conclude that the killings under consideration were heinous, atrocious, or cruel in the abstract. The factor requires a comparison, and such a comparison can be made only if adequate evidence concerning the facts and circumstances of other capital offenses is presented for the jury to consider. No such evidence was presented by the State in Mr. Miller's case.

(*Id*.). Miller argues that counsel should have made it clear to the judge that the state had failed to present the necessary comparative evidence that the jury was require to consider in order to determine if the sole aggravating factor had been proved." (*Id*. at 112).

(1) Procedural Default

Respondent contends that this claim is procedurally defaulted from habeas review based on Miller's failure to comply with state rules. (Doc. 16, at 96-97). This court agrees. When Miller raised this claim on appeal from the denial of his Rule 32 petition, he "suggest[ed] that because this particular claim was not addressed in the

circuit court's order denying the Rule 32 petition, that the court's 'silence is a candid admission that trial counsel's failure to make this argument deprived Mr. Miller of the effective assistance of counsel.'" *Miller*, 99 So. 3d at 421. The state, on the other hand, argued that the claim was not properly before the appellate court because it was not presented in Miller's amended Rule 32 petition. *Id.* The Alabama Court of Criminal Appeals agreed, holding that "this claim was not properly presented to the circuit court and, thus, is not properly before this Court for appellate review." *Id.* The fact that the appellate court went on the address the merits of the claim in an alternative holding has no effect on the court's finding that the claim was procedurally barred. *See Bailey v. Nagle*, 172 F.3d 1299, 1305 (11th Cir. 1999). Thus, this claim is procedurally barred from review in this court.

(2) Merits

Even assuming that this claim were not barred from review in this court, the claim would be due to be denied on the merits. In addressing the claim in an alternative holding, the Alabama Court of Criminal Appeals pointed out that in *Ex Parte Bankhead*, 585 So. 2d 112, 125 (Ala. 1991), the Alabama Supreme Court had previously rejected a defendant's argument that the "especially heinous, atrocious or cruel" aggravating factor required a comparative case. *Miller*, 99 So. 3d at 422-23. In *Bankhead*, the Alabama Supreme Court stated that "[a]lthough a very narrow and

literal reading of the statute may suggest that such a comparison is required, it would be virtually impossible for [trial courts] to implement." *Bankhead*, 585 So. 2d at 125. Instead, the Alabama Supreme Court instructed that the question under the "especially heinous, atrocious or cruel" aggravating factor is whether the murder was "conscienceless or pitiless" and "unnecessarily torturous to the victim," *and* that the statute did not require the state to present comparator cases to establish the aggravating factor. *Id.* Relying on *Bankhead*, the Alabama Court of Criminal Appeals concluded that trial counsel could not have been ineffective for failing to move for a directed verdict on this ground because the state was not required to present other capital cases for comparison under Alabama law.

In his reply brief, Miller argues that, although *Bankhead* recognized that Alabama law did not require a comparative case to establish the aggravating factor, subsequent cases have reached the opposite conclusion. (Doc. 22, at 170). Specifically, Miller points to *Smith v. State*, 756 So. 2d 892, 912-13 (Ala. Crim. App. 1998), *aff'd*, 756 So. 2d 957 (Ala. 2000).

The issue in *Smith* was whether the state *improperly solicited* testimony from a police officer comparing the murder in that case with murders in other capital crimes in terms of heinousness, atrociousness, and cruelty. *Id.* at 912. The Alabama Court of Criminal Appeals determined that the police officer's testimony was

properly admissible because "[i]n determining whether a capital crime is especially heinous, atrocious, or cruel, the fact finder *can* compare the murder at issue with other capital crimes." *Id*. at 912 (emphasis added). However, contrary to Miller's contention, *Smith* does not stand for the proposition that Alabama law *requires* a comparative case to establish the "especially heinous, atrocious, and cruel" aggravating factor. Instead, *Smith* stands for exactly what it says it stands for – that "the factfinder *can* compare the murder at issue with other capital crimes." *Id*. Indeed, subsequent to the Alabama Court of Criminal Appeals' decision in *Smith*, the Alabama Supreme Court affirmed its decision in *Bankhead* that the "especially heinous, atrocious, and cruel" aggravating factor did not require that the state to present comparative criteria for the jury to find the aggravating factor. *See Ex parte Key*, 891 So. 2d 384, 389 (Ala. 2004).

Because Alabama law does not require the state to present a comparative case to establish the "especially heinous, atrocious, and cruel" aggravating factor, Miller was not entitled to a directed verdict based on the lack of a comparative case. *See Hallford v. Culliver*, 379 F. Supp. 2d 1232, 1268-69 (M.D. Ala. 2004) (rejecting argument that Alabama law requires a comparative case to determine whether a crime was "especially heinous, atrocious, or cruel"). Trial counsel was not ineffective for failing to argue that Miller was entitled to a directed verdict on this ground, and

appellate counsel could not be ineffective for failing to present this ineffective assistance of trial counsel claim on appeal. Thus, the state court reasonably determined this claim to be without merit.

Furthermore, even if the court were to review the merits of this claim *de novo*, it would still be due to be denied because it is without merit for the reasons discussed above.

i) Miller's claim that trial counsel was ineffective in connection with his penalty phase closing argument

Miller next contends that appellate counsel should have argued that trial counsel was ineffective in his penalty phase closing argument for failing to focus on Miller's good character and his diminished capacity at the time of the offense. (Doc. 1, at 144). Miller contends that trial counsel made numerous unreasonable statements in his penalty phase closing argument. (*Id*. at 113-15).

First, Miller argues that trial counsel conceded the existence of the "especially heinous, atrocious or cruel" aggravating factor when he stated:

> [T]here is only one possible aggravating circumstance in this case and that is that this is an extremely heinous, atrocious or cruel crime as compared to other capital murders . . . . *I can't imagine any crime where a life is taken that wouldn't be cruel. I can't imagine any crime where victims don't suffer and their families don't suffer.*

(*Id*. at 113). He contends that counsel made no attempt to explain why the judge or jury should not find the existence of the sole aggravating factor. (*Id*.).

Next, Miller alleges that trial counsel was ineffective for failing to point out that the state had failed to produce any evidence showing how Miller's case compared to other capital offenses. (*Id.*). He explains that in the absence of such evidence, and coupled with trial counsel's admission of the sole aggravating factor, the jury was essentially "invited to find the existence of the aggravating factor and was provided with no basis to do otherwise." (*Id.*).

Additionally, Miller faults trial counsel for failing to make arguments that the mitigating factors outweighed the only aggravating factor, making no argument based on the limited evidence Dr. Scott had presented about Miller's family and his mental illness, and making no argument based on the fact that Miller spared the lives of two eyewitnesses and made no attempt to evade capture or cover up his crimes. (*Id.* at 113-14).

Finally, Miller argues that the theme of trial counsel's argument – that "no matter what someone does, they don't deserve to die" – was unreasonable given the fact that ten out of the fourteen jurors and alternates had stated during voir dire that they were not opposed to the death penalty. (*Id.* at 114).

(1) Procedural Default

Respondent contends that this claim is procedurally barred because Miller failed to comply with state procedural rules. (Doc. 16, at 96-97). The record supports

Respondent's contention. The Rule 32 court held that Miller had abandoned this claim because he failed to ask trial counsel a single question regarding why trial counsel adopted this particular approach to his closing argument. (C.R. Vol. 43, Tab 75, at 2098-99). The court also pointed out that Miller failed to present any evidence showing what a reasonable attorney would have argued during closing arguments or how Miller suffered prejudice as a result of trial counsel's actions. (*Id*. at 2099). The Alabama Court of Criminal Appeals likewise found that this claim was procedurally barred from review because Miller had abandoned the claim. *Miller*, 99 So. 3d at 425. Thus, this court finds that this claim is procedurally barred from habeas review. *See Brownlee v. Haley*, 306 F.3d 1043, 1066–67 (11th Cir. 2002).

(2) Merits

Even without the procedural bar, this claim would still be due to be dismissed on the merits under *de novo* review. Miller's argument is essentially that trial counsel should have presented different arguments to the jury. However, because Miller failed to question trial counsel about his strategy regarding his closing statement, there is no evidence regarding why trial counsel adopted this particular approach to his closing argument. This silent record cannot overcome the presumption that trial counsel acted reasonably in choosing this approach to his closing argument. *See Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) ("Counsel's competence . . . is

presumed and the defendant must rebut this presumption by *proving* that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy.").

Additionally, a review of Miller's closing statement demonstrates that it was not so poor as to be objectively unreasonable. The following is the entirety of trial counsel's penalty phase closing argument:

> May it please the court, ladies and gentlemen.
>
> I know by now you have been sitting for a long time, a long number of days and you don't want anybody else to be long winded; however, please grant me whatever time it takes, and I will be just as brief as I can, to say what I've got to say and what I'm feeling about this at this point.
>
> We are at that stage where it is - - something of a balancing act here and - - but there is a very mechanical part of this and it almost seems to me to be obscene to talk about the mechanics of doing this, but here are the mechanics and the judge will tell you what they are after we get through here, but here are the mechanics.
>
> You first have got to make a decision as a group and it has to be a unanimous decision, the same way your verdict was unanimous, but there is an aggravating circumstance in this case. The judge will tell you if you cannot first unanimously agree that there is an aggravating circumstance in this case, then you must simply say life, we recommend life without parole.
>
> If you unanimously agree that there is an aggravating circumstance, then at that point the team effort is over, everything you've done up until this point has been something of a team effort, you had to have a unanimous verdict of guilt, you have to have a unanimous verdict on the aggravating circumstance, but at that point you are one on

one with Alan Miller because at that point you are deciding what you in your conscience to do with him.

And if it was humanly possible to make eye contact with twelve people at once, that's what I would be doing at this point because I want to talk to you now about that decision if you get that far.

Remember to get that far you've got to unanimously decide that there is an aggravating circumstance and there is only one possible aggravating circumstance in this case and that is that this is an extremely heinous, atrocious or cruel crime as compared to other capital murders.

There again, it seems obscene to me to talk about the atrocity of crimes of the heinousness of the crime.

I can't imagine any crime where a life is taken that wouldn't be cruel. I can't imagine any crime where victims don't suffer and their families don't suffer. But what you're dealing with here now is not whether a crime in and of itself is atrocious, heinous and cruel, it's whether this particular crime is extremely heinous, atrocious or cruel as compared to other capital murders.

So already you've got a relative term there. If you find unanimously that yes, this one is, then you consider mitigating circumstances. Some of them are set out in the law. I have read to Dr. Scott two of them. There is a third one, the judge will charge you that there are three mitigating circumstances that have been presented to you for your consideration. One of them has been - - at least one has been agreed upon and that is that Alan Miller has no prior criminal history. The law considers that a mitigating circumstance.

Another one has to do - - I will have to read them because I just can't recall them. Second one if it was committed while the defendant was under the influence of extreme mental or emotional disturbance; that is a mitigating circumstance.

The rational [sic] I don't need to sit here and tell you. Greatest injustice of all is the equal treatment of unequals. If you think that you

are dealing with an unequal here, don't treat them equally, the same way you would to me.

The third one of the statutory mitigating circumstances is whether capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to requirements of law which was substantially impaired.

For reasons that Dr. Scott stated to you and he can present those to you much more eloquently than I can and did. Those are three that at this point I suggest to you are unrebutted.

Now, it's not a mathematical test anyway. The fact that we have three to possibly their one doesn't mean that this - - that you can't impose the death penalty. But actually Mr. Ladner - - what I suggest to you is the most mitigating of all circumstance is that we're on the same page on one thing, what Mr. Ladner said was the reason that you impose this death penalty is to prevent Mr. Miller and others like him from doing these kinds of things.

Now, think about that a minute. Is that going to prevent what Mr. Miller did? Is it going to prevent anyone else from doing it? It has nothing to do with prevention. But perhaps we can do something here that might and wouldn't that be the most mitigating circumstance of all because the only way it seems to me that you can prevent an offense from being committed is to impose the penalty before the crime and surely we haven't become that blood thirsty.

But there perhaps may be a way to use this to prevent something and that would be somewhere we have to start, we have to work into our national character, this notion that it really doesn't matter what you do, you deserve to live. That is not a sympathetic approach. That, I suggest to you, is the only approach that keeps anyone from going out and doing what we see and hear and read about in the papers day after day and we keep pulling our hair out and we keep sitting around and saying, how in the world, what is wrong. Because in all my young life, I grew up like all of you did, I'm sure, around all types of people, some of them pretty doggone mean, I wouldn't fool with them.

But not one person in my young life do I ever remember suggesting that they wanted to kill their parents, that they wanted to blow up a school, that they wanted to just go in and mow down people because they might belong into a particular group.

And that mentality, however, has become pervasive in our society. And when I struggle, like I'm sure you must, with how do we stop this stuff, I can only come to one answer and that is we have to set as our number one priority when we define values for ourselves and our children that no matter what someone does, they don't deserve to die because any other - - by any other definition, we get down to quantifying this stuff which seems to me just not to make good sense.

Because if we believe, if we continue to believe that we can refine our system here and we can sit here and use terms like I've used, I can't even remember the terms that I've already said here, and say, okay, this is death, this is life, this is death, this is life, depends on whether these words mean what they mean or this particular situation fits into these words. As long as we're willing to do that, and as long as we can confine that analysis to the sophistication of a courtroom, then we're going to continue to see what we see every day. And we're going to struggle with children when we try to explain or understand how in the world could you kill a classmate, well, they deserved to die.

Just like I said to you before, the only way to have prevented this crime - - and I know everyone of you right now just like - - all of your hearts have got to hurt, wishing that you could have prevented this crime. Just like I wish I could have prevented this crime.

But I suggest to you that the only way this crime could have been prevented was on the morning of August the 5th, I believe that if Alan Miller, if I had known what was going to go on, and I'm sure everybody in here would do the same thing, if you had known that this was about to happen, you would have done what you could to prevent it.

So ask yourself this, if you had seen Alan Miller that morning and had a clue that this was going to go on and you could have told him one

> of two things, you could have said, Alan, if you go in there and do this, you may lose your own life or you could have said, Alan, no matter what anyone has done to you, they don't deserve to die for it.
>
> Now, which one of those two ideas would have prevented this from happening. I will reiterate what I said earlier and that is that you're on a stage, there's a crowd out here and the crowd is screaming for you to kill him, but you have got to think long and hard, please, about what I have said.
>
> Now, you may have noticed that every time I have spoken here the state has come up right behind me, they will do it again. That's because that's the mechanics of a trial. And then I will sit there and I will bite my tongue while they talk to you and bite my lip and I won't get a chance to stand back up, it won't be because that I agree with what they're saying, it won't be because I do not believe I have a better answer for anything they might say, it will be because there has to be a stopping point and that is it.
>
> Please, all I ask of you is to consider those things that you have heard in this courtroom in this phase of the hearing, consider those things that I have suggested to you might not just mitigate this offense but that might mitigate any future victims. Let's think about those people, okay.
>
> Thank you very much.

(C.R. Vol 8, Tab 24, at 1409-17).

Trial counsel's theme in his penalty phase closing argument echoed that of his penalty phase opening statement – that no one deserves to die regardless of what he has done or what the jurors might think about him. Although Miller contends that this approach was unreasonable given that ten of the fourteen jurors and alternates had stated they favored the death penalty, this court finds that such an approach falls

within the broad range of reasonable professional conduct. Additionally, given the strength of the state's case showing the brutal nature of Miller's crimes, the court finds that a different closing argument would not have resulted in a lesser sentence or that the closing argument in any way undermined the reliability of the outcome of the penalty phase. *See Windom v. Sec'y, Dep't of Corrs*, 578 F.3d 1227, 1251-52 (11th Cir. 2009). Therefore, the ineffective assistance of trial counsel claim would be due to be denied on the merits even if it were not procedurally barred.

j) Miller's claim that trial counsel was ineffective for failing to object to the court's penalty phase jury instructions

Miller alleges that appellate counsel should have argued that trial counsel was ineffective for failing to object to the court's instruction that the jury was making a "recommendation." (Doc. 1, at 144). Miller alleges that the trial court diminished the jury's sense of sentencing responsibility by repeatedly emphasizing that the jury would be making only a recommendation to the court regarding the death sentence and failing to advise the jurors that any aspect of their decision was binding on the court. (*Id*. at 115-17). According to Miller, the

> jurors were never advised that any aspect of their decision was binding on the trial court, let alone that they were responsible for making a final decision on the existence of an aggravating factor, without which Mr. Miller could not be sentenced to death. The jurors simply had no way to know of their determinative role. To the contrary, they were led to believe just the opposite. By so diminishing the jury's sense of sentencing responsibility, the instructions and other judicial comments

> in Mr. Miller's case violated Miller's Eighth Amendment rights under *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985).

(*Id*. at 117-18).

(1) Procedural Default

This claim is procedurally defaulted. Miller raised this claim in his Rule 32 petition, and that court found the claim to be "completely without merit." (C.R. Vol. 43, Tab 75, at 2101). However, Miller did not raise the claim on appeal from the denial of his Rule 32 petition. (*See* Rule 32 R. Vol. 38, Tab 63). Thus, this claim is barred from habeas review. *See Woodford v. Ngo*, 548 U.S. 81, 92 (2006) ("A state prisoner is generally barred from obtaining federal habeas relief unless the prisoner has properly presented his or her claim through one 'complete round of the State's established appellate review process.'") (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)).

(2) Merits

Alternatively, this claim is due to be dismissed because the Rule 32 court, the last state court to review the claim, denied the claim on the merits. In denying the claim, the Rule 32 court stated:

> This Court denies Miller's claim because he has failed to meet his burden of proof that his trial counsel were deficient for not objecting to the trial court's instructions and has failed to demonstrate how he was prejudiced. Miller's contention is completely without merit. Under Alabama law, the jury's sentencing determination in capital cases is

> advisory only. Ala. Code § 13A-5-47(a). During the penalty phase instructions, the trial court properly referred to the jury's determination as a recommendation. (R. 1427, 1428, 1441) Alabama courts have routinely rejected claims that such an instruction is improper. *See Harris v. State*, CR-04-2363, 2007 WL 4463947 at *20 (Ala. Crim. App. December 21, 2007)("Alabama courts have repeatedly held that a prosecutor's comments and a trial court's instructions accurately informing a jury that its sentencing verdict is advisory or is a recommendation do not violate *Caldwell v. Mississippi*, 472 U.S. 320 (1985)"); *Brown v. State*, CR-04-0293, 2007 WL 1865383, at *46 (Ala. Crim. App. June 29, 2007) (same).
>
> Miller has presented no evidence that the jury in his case was "led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell*, 472 U.S. at 328. To the contrary, the trial court instructed the jury that "[i]t is your sole responsibility to determine what the facts are and recommend the punishment in this case." (R. 1439) Therefore, trial counsel could not be ineffective for failing to make an objection to the trial court's references to the sentencing recommendation of the jury because the trial court's instructions were proper and did not violate *Caldwell*. *See McNabb v. State*, 991 So. 2d 313, 327 (Ala. Crim. App. 2007) ("[C]ounsel could not be ineffective for failing to raise a baseless objection.") Accordingly, Miller has failed to meet his burden of proof and his claim is denied.

(C.R. Vol. 43, Tab 75, at 2101-03).

In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the prosecutor "urged the jury not to view itself as determining whether the defendant would die, because a death sentence would be reviewed for correctness by the State Supreme Court." 472 U.S. at 323. The Court held that the comment sought to minimize the jury's sense of responsibility for determining the appropriateness of a death sentence, thereby

violating the Eighth Amendment. *Id*. at 341. The Court found that the prosecutor's argument was "inaccurate, both because it was misleading as to the nature of the appellate court's review and because it depicted the jury's role in a way fundamentally at odds with the role that a capital sentencer must perform," and because it was "not linked to any arguably valid sentencing consideration." *Id*. at 336.

Miller claims that throughout the trial, the court "repeatedly informed the jurors that their sentencing verdict was merely a 'recommendation' to the Court, which would make the final determination whether Mr. Miller would live or die," but never advised the jury that "any aspect of their decision was binding on the trial court, let alone that they were responsible for making a final decision on the existence of an aggravating factor, without which Mr. Miller could not be sentenced to death." (Doc. 1, at 115, 117-18). However, Miller has not cited a single instance in the trial transcript where the judge instructed the jury that it was the court, and not the jury, who would make the final determination as to Miller's fate. Rather, a review of the court's instructions in both phases of the trial reveals that while the court made several references to the fact that the jury would "recommend" the punishment in the case, he never specifically stated that the penalty phase verdict would be merely advisory, or gave the jury the impression that their verdict not final, would be reviewed, or that the moral obligation of determining the sentence rested elsewhere.

(*See* C.R. Vol 7, Tab 16 and Vol. 8, Tab 26). Nonetheless, Alabama law provides that a jury's role in the penalty phase is "advisory." *Ala. Code* § 13A-5-46 (1975). Thus, any "instruction" to the jury that their verdict was advisory, or a recommendation, was entirely consistent with Alabama Law. As the Eleventh Circuit Court of Appeals stated in *Duren v. Hopper*, 161 F.3d 655 (11th Cir. 1998):

> In outlining the jury's proper sphere, the court did not mislead the jury, diminish its importance, or absolve it of responsibility for its decision. *See Harich v. Dugger*, 844 F.2d 1464, 1473 (11th Cir.1988)(holding that informing jury of its "advisory" function does not violate *Caldwell*). FN.
>
> > FN. This court in *Harich* held that "a *Caldwell* violation should include some affirmative misstatement or misconduct that misleads the jury as to its role in the sentencing process." *Harich v. Dugger*, 844 F.2d 1464, 1473 (11th Cir.1988). There was no such affirmative misinformation in this case.
>
> Rather, unlike the prosecutor's comments in *Caldwell*, the instruction given by the trial court in this court was accurate and in accordance with Alabama law. Thus, Duren cannot satisfy the prejudice prong of *Strickland*, and his ineffective assistance of counsel claim must fail.

Duren, 161 F.3d at 664.

Because the court's instructions were proper, trial counsel could not have been ineffective for failing to raise an objection. *See Bearden v. State*, 825 So. 2d 868, 872 (Ala. Crim. App. 2001) ("[C]ounsel could not be ineffective for failing to raise a baseless objection."); *Chandler v. Moore*, 240 F.3d 907, 917 (11th Cir. 2001)

(counsel is not ineffective for failing to raise a non-meritorious objection). It follows that Miller cannot demonstrate that appellate counsel was ineffective based on his failure to raise this claim. Accordingly, Miller fails to show that the state court's rejection of this claim was unreasonable, and he would not entitled to habeas relief on this ground, even if the claim were not procedurally barred.

k) Miller's claim that trial counsel was ineffective in failing to request a special verdict form

Miller next alleges that appellate counsel were ineffective for failing to argue that trial counsel was ineffective regarding the verdict form the trial court provided to the jurors. (Doc. 1, at 118-20, 144). At the close of the penalty phase, the court provided the jurors a general verdict form that asked only the number of votes for life imprisonment and the number of votes for the death penalty. (*Id*. at 118-19).

Miller alleges that trial counsel should have requested a special verdict form that would have required the jurors to first explicitly indicate whether they had unanimously found the existence of the aggravating circumstance – a prerequisite finding necessary for Miller to be eligible for the death sentence – before determining whether to recommend life or death. (*Id*. at 119). Miller highlights the fact that only ten out of the twelve jurors voted for death, and argues that because of trial counsel's failure to request a special verdict form, the record is unclear whether all twelve jurors found the existence of an aggravating factor. (*Id*.).

(1) Procedural Default

Respondent correctly asserts that this claim is procedurally barred from review because Miller failed to raise the claim in compliance with state procedural rules. (Doc. 16, at 96). The Rule 32 court determined that Miller had abandoned this claim by failing to ask trial counsel any questions regarding his decision not to request a special verdict form and failing to ask any questions that would establish how he was prejudiced by his trial counsel's decision. (C.R. Vol. 43, Tab 75, at 2100-01). The Alabama Court of Appeals also found that this claim was procedurally barred from review because Miller abandoned the claim. *Miller*, 99 So. 3d at 425. Thus, the claim is barred from habeas review. *See Brownlee v. Haley*, 306 F.3d 1043, 1066-67 (11th Cir. 2002).

(2) Merits

Absent a procedural bar, this claim would still be due to be dismissed because the ineffective assistance of trial counsel claim lacks merit. The trial court adequately instructed the jurors that they must first unanimously find the existence of an aggravating factor before determining whether to recommend the death penalty. The court instructed the jury:

> Now, as I stated to you before, the burden of proof is on the State of Alabama to convince each of you beyond a reasonable doubt as to the existence of any aggravating circumstance considered by you in determining what punishment is to be recommended in this case. *This*

means that before you can even consider recommending the defendant's punishment to be death, each and every one of you must be convinced beyond a reasonable doubt based on the evidence that an aggravating circumstance exists.

. . . .

In order to consider an aggravating circumstance, it is necessary that the jury unanimously agree upon its existence. All twelve of you must be convinced beyond a reasonable doubt that an aggravating circumstance exists in order for any of you to consider that aggravating circumstance in determining what the sentence should be.

However, it's not necessary for there to be a unanimous agreement upon the existence of a mitigating circumstance before you can consider it in setting punishment.

. . . .

There must be a unanimous agreement on the existence of a particular aggravating circumstance before it can be considered by any juror. There need not be a unanimous agreement on the existence of any particular mitigating circumstance before it can be considered.

(R. Vol. 8, Tab 26, at 1433, 1438)(emphasis added).

Thus, the court adequately informed the jurors that they must first unanimously find the existence of an aggravating circumstance before recommending death. Additionally, the state's penalty phase opening statement as well as Miller's penalty phase closing argument reminded the jurors that the existence of an aggravating factor was a prerequisite to recommending a death sentence. (R. Vol. 8, Tab 19, at 1314-15; R. Vol. 8, Tab 24, at 1409-10). In the state's opening statement, the

prosecutor stated that the state bore the burden of establishing beyond a reasonable doubt the existence of the aggravating circumstance and that the jurors must first find the "existence of an aggravating factor to even consider the imposition or the recommendation of the death penalty in this case." (R. Vol. 8, Tab 19, at 1315). Miller's trial counsel reiterated this rule in his closing argument when he stated, "[t]he judge will tell you if you cannot first unanimously agree that there is an aggravating circumstance in this case, then you must simply say life, we recommend life without parole." (R. Vol. 8, Tab 24, at 1410).

In the face of the instructions of the court, as well as the repeated reminders of both the prosecution and defense, Miller has offered nothing to raise even a doubt that the jurors understood the determinations they had to make during the penalty phase deliberations. *See Evans v. Sec'y, Fla. Dep't of Corr.*, 699 F.3d 1249, 1260 (11th Cir. 2012) ("The jury's verdict necessarily contained [findings than an aggravating circumstance existed] because the jury was instructed that it could not recommend a death sentence unless it found beyond a reasonable doubt that one or more aggravating circumstances existed."). The jury's recommendation of death, although not unanimous, proves that the jury must have unanimously found the existence of the aggravating circumstance. Thus, regardless of whether a special verdict form had been provided to the jury, the outcome of the proceeding would have

been the same. Because Miller suffered no prejudice under *Strickland*, the ineffective assistance of trial counsel claim is without merit and appellate counsel cannot be ineffective for failing to raise it. Therefore, the court concludes that this claim is due to be dismissed.

l) Miller's claim that trial counsel was ineffective at the sentencing hearing

Miller alleges that appellate counsel was ineffective for failing to argue that trial counsel was ineffective for failing to present mitigating evidence at the sentencing hearing. (Doc. 1, at 120-23, 145; Doc. 22, 172-78). He alleges that trial counsel could have presented a wealth of readily available mitigating evidence, including records and witnesses demonstrating Miller's abusive and traumatic childhood, mental health issues affecting Miller and members of his family, his hard-working and caring nature, and his excellent employment record. (Doc. 1, at 120). He adds that trial counsel offered no evidence, called no witnesses, and failed to arrange for anyone to appear on Miller's behalf. (*Id*.). He contends that had counsel called available witnesses to testify at the sentencing hearing, their testimony would have provided the court with critical mitigating evidence not otherwise available to the judge, providing a substantial basis for sentencing Miller to life imprisonment rather than death. (*Id*.).

Miller asserts that he was severely prejudiced by counsel's deficient performance. (*Id*. at 121). Specifically, he points out that the pre-sentencing investigative report prepared by the Alabama Board of Pardons and Paroles "woefully understated the horrible abuse Mr. Miller had suffered at the hands of his father." (*Id*.). Miller also points out that trial counsel failed to introduce either Dr. Scott's or Dr. McDermott's reports that contained detailed summaries of Miller's family history and background. (*Id*.). Miller argues that the prejudice he suffered as a result of trial counsel's failure to present additional mitigating evidence is apparent from Judge Crowson's statement at sentencing that his decision was "probably the most difficult sentence that I've ever had to consider" and that "I've been wrestling with it for a long time." (*Id*. at 121-22).

(1) No Procedural Default

Miller properly raised this claim on collateral appeal, and the Alabama Court of Criminal Appeals addressed the claim on the merits. *Miller*, 99 So. 3d at 423-24. Therefore, the court reviews the determinations of the state court under AEDPA deference.

(2) Merits

The Rule 32 court denied this claim, making the following determinations:

> This Court denies Miller's claim because he has failed to meet his burden of proof of demonstrating that his trial counsels' performance

was deficient under *Strickland*, 466 U.S. at 687. Ala. R. Crim. P., 32.7(d). Alabama courts have held that "counsel does not necessarily render ineffective assistance simply because he does not present all possible mitigating evidence." *McGahee v. State*, 885 So.2d 191, 221 (Ala. Crim. App. 2003). However, as noted above, trial counsel presented a competent mitigating case concerning Miller's mental health and background during the penalty phase of the trial. The trial court presided over Miller's trial and heard all of the mitigating evidence presented. Simply the fact that Miller's trial counsel could have presented more mitigation evidence during the sentencing hearing does not establish deficient performance under *Strickland*. *See McGahee*, 885 So.2d at 221 ("Trial counsel could have called more witnesses at the penalty-phase hearing before the trial judge, with the hope that the additional information would have convinced the trial judge to agree with the jury's recommendation and to sentence McGahee to life imprisonment without parole. The same can be said after any sentencing hearing in a capital case in which a death sentence is imposed after the jury recommended a sentence of life imprisonment without parole.") (emphasis in original).

Miller failed to ask trial counsel any questions regarding the reasons why he did not call any witnesses or present evidence during the sentencing hearing. (Rule 32 R. 200–01) Therefore, trial counsel's performance must be presumed to be reasonable. . . .

This claim is also denied because Miller has failed to meet his burden of proof of demonstrating that he was prejudiced. *See Strickland*, 466 U.S. at 695; Ala. R. Crim. P., 32.7(d). Miller failed to establish what additional evidence could have been submitted during the sentencing hearing. Miller asked trial counsel whether he submitted Dr. Scott or Dr. McDermott's report during the sentencing hearing before the trial court; however, the substance of both reports had been already presented during the penalty phase. Furthermore, the trial court found three statutory mitigating circumstances to exist. *Miller*, 913 So.2d at 1169. Miller has failed to demonstrate what additional mitigating circumstances could have been proven during the sentencing hearing. Accordingly, Miller has failed to establish proof that he was prejudiced, and this claim is denied.

(C.R. Vol. 43, Tab 75, at 2103-05).

The Alabama Court of Criminal Appeals found that the Rule 32 court's findings of fact and conclusions of law were supported by the evidence; it concluded that "[b]ecause [Miller] failed to establish that his ineffective-assistance-of-trial-counsel claim is meritorious, he has failed to prove by a preponderance of the evidence that his appellate counsel was ineffective for failing to present this claim." *Miller*, 99 So. 3d at 424 (quoting *Payne v. State*, 791 So. 2d at 401-02)).

Although the state court addressed both the performance and prejudice prong of *Strickland*, this court will limit its analysis to determining whether Miller suffered any prejudice as a result of trial counsel's performance. *See Jones v. GDCP Warden,* 815 F.3d 689, 715-16 (2016)(quoting *Waters v. Thomas*, 46 F.3d 1506, 1510 (11th Cir. 1995) ("Notably, a court 'may decline to reach the performance prong of the ineffective assistance test if convinced that the prejudice prong cannot be satisfied.'")

To establish prejudice under *Strickland*, Miller bears the burden of demonstrating a "reasonable probability" that he would not have received a death sentence if trial counsel had presented the mitigating evidence that was presented during the Rule 32 hearings. This burden becomes even greater in the context of the AEDPA, where Miller must demonstrate that no reasonable jurist could determine that there was not a reasonable probability that the outcome of the proceeding would

have been different but for trial counsel's performance. *See Brooks v. Comm'r, Ala. Dep't of Corrs*, 719 F.3d 1292, 1300 (11th Cir. 2013). Although the prejudice question in this case may be close given the trial court's statements about its struggle in deciding to sentence Miller to death,[34] this court is persuaded that a reasonable jurist could conclude that Miller did not suffer any prejudice.

As this court discussed previously, the additional evidence Miller presented during the Rule 32 hearings was largely cumulative of the evidence trial counsel presented through the testimony of Dr. Scott in the penalty phase. Although the pre-sentencing report did not accurately portray the abuse that Miller suffered at the hands of his father, the trial judge heard Dr. Scott's penalty phase testimony during which he testified about the physical and emotional abuse that Miller suffered. Although the court might not have heard of all of the specific examples of abuse that Miller suffered, the court was aware that his father frequently hit Miller and had even threatened him with a knife. (*See* R. Vol. 8, Tab 22, at 1350-51). The court was also aware that Miller had observed his father using intravenous drugs and that Miller was raised in poverty. (*See Id*. at 1350; *see also* Rule 32 C.R. Vol. 31, at 415-16).

[34] The undersigned judge notes from personal experience that imposing a harsh sentence frequently results from a "struggle." Imposing the ultimate sentence of death should never be an easy decision.

Given the largely cumulative nature of the mitigating evidence Miller presented at the Rule 32 hearings, this court concludes a reasonable jurist could determine that the "new" mitigating evidence – evidence of Miller's loving relationships with his family members, his strong work history, and his family's history of mental illness – would have been insufficient to sway the sentencing judge to recommend a different sentence. Thus, a reasonable jurist could conclude that Miller's trial counsel was not ineffective, and, likewise, that appellate counsel was not ineffective for failing to raise this claim.

Accordingly, Miller fails to show that the state court's rejection of this claim was unreasonable, and Miller is not entitled to habeas relief on this ground.

m) Miller's claim that trial counsel was ineffective in failing to bring the Supreme Court's decision in *Apprendi v. New Jersey* to the trial court's attention

Miller alleges that appellate counsel should have argued that trial counsel was ineffective for failing to notify the trial court of the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). (Doc. 1, at 145). In *Apprendi*, the Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 492. Miller argues that if trial counsel had presented this argument at the sentencing hearing, he would have been able to obtain

a new penalty phase trial before a jury that had been informed that their determination regarding the aggravating factor was not merely a "recommendation." (Doc. 1, at 122).

(1) Procedural Default

Respondent correctly contends that this claim is procedurally defaulted because Miller failed to comply with state procedural rules. (Doc. 16, at 96). In addressing this claim, the Alabama Court of Criminal Appeals held that the claim was not properly before that court, because the "assertion was neither presented in Miller's amended Rule 32 petition, nor was it addressed in the evidentiary hearing." *Miller*, 99 So. 3d at 425 (citing *Arrington v. State*, 716 So .2d 237, 239 (Ala. Crim. App. 1997) ("An appellant cannot raise an issue on appeal from the denial of a Rule 32 which was not raised in the Rule 32 petition."). Because the Alabama Court of Criminal Appeals stated clearly that this claim is barred based upon Miller's failure to follow state procedural rules, the procedural default doctrine precludes federal review of this claim. *See Coleman v. Thompson*, 501 U.S. 722, 731 (1991) ("When a petitioner fails to raise his federal claims in compliance with relevant state procedural rules, the state court's refusal to adjudicate the claim ordinarily qualifies as an independent and adequate ground for denying federal review."); *Cone v. Bell*, 556 U.S. 449, 465 (2009).

(2) Merits

Even without the procedural default, this claim lacks merit. If trial counsel had brought *Apprendi* to the attention of the court, Miller still would not have been entitled to a new penalty phase because the court and the attorneys notified the jurors that they must find the existence of the aggravating factor – that the crime was especially heinous, atrocious, or cruel – beyond a reasonable doubt before they could even consider whether to recommend the death penalty.

The court instructed the jurors:

> Now, as I stated to you before, the burden of proof is on the State of Alabama to convince each of you beyond a reasonable doubt as to the existence of any aggravating circumstance considered by you in determining what punishment is to be recommended in this case. This means that before you can even consider recommending the defendant's punishment be death, each and every one of you must be convinced beyond a reasonable doubt based upon the evidence that an aggravating circumstance exists.

(R. Vol. 8, Tab 27, at 1433).

Based on this instruction, the court submitted to the jurors the question of whether the state proved the existence of the aggravating circumstance beyond a reasonable doubt. This instruction reflects what *Apprendi* requires. *See Apprendi*, 530 U.S. at 490 ("[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). The fact that ten out of the twelve jurors recommended

sentencing Miller to death demonstrates that all of the jurors must have determined that the aggravating circumstance existed beyond a reasonable doubt. *See Brown v. Jones*, 255 F.3d 1273, 1280 (11th Cir. 2001) ("[J]urors are presumed to follow the court's instructions."); *Raulerson v. Wainwright*, 753 F.2d 869, 876 (11th Cir. 1985 ("Jurors are presumed to follow the law as they are instructed."); *Ingram v. Zant*, 26 F.3d 1047, 1053 (11th Cir. 1994). Therefore, because Miller was not entitled to a new trial under *Apprendi*, trial counsel was not ineffective for failing to bring the case to the attention of the court. Likewise, appellate counsel could not be ineffective for failing to present this ineffective assistance of trial counsel claim. This court finds this claim would be due to be denied on the merits even if it were not procedurally defaulted.

5. Claim B(vi): Miller's Claim that Appellate Counsel was Ineffective in the Appeal to the Alabama Court of Criminal Appeals

In this claim, Miller sets forth numerous arguments as to appellate counsel's ineffectiveness regarding the brief submitted to the Alabama Court of Criminal Appeals by appellate counsel. (Doc. 1, at 145-49). Specifically, Miller alleges that appellate counsel's brief presented truncated and cursory challenges to trial counsel's guilt phase opening statement, trial counsel's failure to present an insanity defense, trial counsel's failure to investigate and present mitigating evidence, and trial counsel's penalty phase opening statement. (*Id.*). Miller contends that but for

appellate counsel's unreasonable representation, a reasonable probability exists that he would have been granted either a new trial or a new sentencing hearing. (*Id*.).

a) Procedural Default

Miller failed to present this claim before either the Rule 32 court or the Alabama Court of Criminal Appeals. His failure to properly exhaust this claim bars this court from granting habeas corpus relief. *See Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998) ("Exhaustion of state remedies requires that the state prisoner 'fairly presen[t] federal claims to the State courts to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights.'") (quoting *Duncan v. Henry*, 513 U.S. 364, 365 (1995)).

b) Merits

Alternatively, this claim would also be due to be denied on the merits under a *de novo* standard of review. This court has examined all of the ineffective assistance of trial counsel claims that Miller alleges appellate counsel failed to adequately present in his brief, and has determined each claim lacks merit. Therefore, this court finds this claim of ineffective assistance of appellate counsel also lacks merit.

C. MILLER'S CLAIM THAT HIS DEATH SENTENCE VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Miller argues that Alabama's advisory capital sentencing scheme violates *Ring v. Arizona*, 536 U.S. 584 (2000) and *Hurst v. Florida*, 136 S. Ct. 616 (2016),[35] and effectively eliminated the jury's role and responsibility for sentencing Miller to death in several ways. (Doc. 1 at 149, Doc. 43). First, Miller alleges that although *Ring*'s fundamental principle is that the jury occupies a determinative role in capital sentencing, the trial court's instructions misled the jurors into believing their sentencing role was purely advisory. (*Id.* at 149-50).

Second, Miller argues that because *Ring* requires the jury to "find beyond a reasonable doubt, 'all facts essential to imposition of the level of punishment that the defendant receives,'" Alabama juries are required to determine beyond a reasonable doubt *both* that an aggravating circumstance existed *and* that the aggravating factors outweighed the mitigating factors. (*Id*. at 150-52) (quoting *Ring*, 536 U.S. at 610). He claims that the jury in his case was not instructed that it had to find that the sole aggravating factor outweighed the mitigating circumstances beyond a reasonable doubt to return a verdict for death. (*Id*. at 152). Rather, he asserts that the court's instructions explained to the jurors that they were required to apply a beyond a

[35] The court granted Miller leave to cite *Hurst* in support of his petition. (*See* Doc. 42).

reasonable doubt standard only when determining the existence of the aggravating factor, not in the weighing of aggravating and mitigating factors. (*Id*.).

Finally, Miller argues that his death sentence is "unsupported by any verifiable jury findings as required by *Ring*." (*Id*.). He maintains a "strong reason to doubt that the Miller jurors were unanimous in finding the necessary aggravating circumstance." (*Id*.).

The Alabama Court of Criminal Appeals reviewed and rejected these arguments on direct appeal:

> the jury's 10-2 recommendation of death during the sentencing phase indicated that it must have found the existence of the aggravating circumstance that the offense was "especially heinous, atrocious, or cruel compared to other capital offenses." § 13A-5-49(8), Ala. Code 1975. This was the only aggravating circumstance the court instructed the jury on. Indeed, during the court's penalty-phase instructions, the court clearly instructed the jury that it could not proceed to a vote on whether to impose the death penalty unless it first found beyond a reasonable doubt the existence of at least one aggravating circumstance. (R. 1433-35.) Thus, the jury's 10-2 vote recommending death established that the jury unanimously found the existence of the "especially heinous, atrocious, or cruel" aggravating circumstance, giving the trial judge the discretion to sentence Miller to death. *See* § 13A-5-46(e)(1)-(3), Ala. Code 1975; *see also Ex parte Slaton*, 680 So.2d 909, 927 (Ala. 1996), *cert. denied*, 519 U.S. 1079, 117 S.Ct. 742, 136 L.Ed.2d 680 (1997); *Duke v. State*, 889 So.2d 1, opinion on return to remand, 889 So.2d 40 (Ala. Crim. App. 2002).

Miller, 913 So. 2d at 1168-69 (footnote omitted).

As discussed below, the state court's rejection of these claims did not result "in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," and did not result "in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(d)(2).

Miller first argues that

> *Ring*'s fundamental principle is that the jury occupies a determinative role in capital sentencing. The trial court's instructions in Mr. Miller's case misled the jurors into believing their sentencing role is purely advisory, notwithstanding *Ring*.
>
> The jurors were told no fewer than 20 times that their sentencing decision was merely a recommendation to the court. The jurors were never advised that any aspect of their decision was binding on the trial court, let alone that they had final responsibility for making the necessary predicate finding of the existence of an aggravating factor, without which Miller could not be sentenced to death. The jurors simply had no way to know of their determinative role. To the contrary, they were led to believe just the opposite. By so diminishing the jury's sense of sentencing responsibility, the instructions in Miller's case violated Miller's Eighth Amendment rights under *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (holding it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere).

(Doc. 1, at 149-50). Miller adds that *Hurst* and *In re Bohannon v. State*, No. 1150640, 2016 WL 5817692, at *5 (Ala. Sept. 30, 2016) confirm that his death sentence violated *Caldwell*. (Doc. 41, at 8-9; Doc. 48).

To establish a *Caldwell* violation, "a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Romano v. Oklahoma*, 512, U.S. 1, 9 (1994) (quoting *Dugger v. Adams*, 489 U.S. 401, 407 (1989)). "The infirmity identified in *Caldwell* is simply absent" in a case where "the jury was not affirmatively misled regarding its role in the sentencing process." *Romano*, 512 U.S. at 9. In this case, Miller's claim of *Caldwell* error must fail because the court correctly informed the jurors of their advisory function under Alabama law.

Under Alabama law, the jury's sentencing determination is "advisory." *See* Ala. Code § 13A-5-46 (describing the jury's sentencing role as "advisory" ten separate times). Thus, the court's instruction informing the jury that they were making a recommendation as to Miller's sentence does not constitute a *Caldwell* violation. *See Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997) ("'The infirmity identified in *Caldwell* is simply absent' in a case where 'the jury was not affirmatively misled regarding its role in the sentencing process.'")(quoting *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994)). Therefore, this argument has no merit.

Miller further alleges that "*Hurst* confirms *Ring*'s holding that a jury must find all facts that make a defendant eligible for the death penalty, and it illustrates that under *Ring* an advisory jury verdict does not satisfy the Sixth Amendment's requirements." (Doc. 41 at 4) (citing *Hurst*, 136 S. Ct. at 621-22). He asserts:

> This holding eviscerates the Alabama Court of Criminal Appeals' holding, in its decision affirming Mr. Miller's conviction and death sentence on direct appeal, that *Ring* was inapplicable because of the jury's advisory verdict: "It is unnecessary to address the [*Ring*] argument because the jury's 10-2 recommendation of death . . . indicated that it must have found the existence of the aggravating circumstance." *Miller*, 913 So. 2d at 1168-69. *Hurst* explicitly holds that *Ring* is not satisfied by any such inference from a jury's advisory verdict:
>
> > Florida argues that when Hurst's sentencing jury recommended a death sentence, it "necessarily included a finding of an aggravating circumstance." The State contends that this finding qualified Hurst for the death penalty under Florida law, thus satisfying *Ring*. . . .
> >
> > The State fails to appreciate the central and singular role the judge plays under Florida law. . . . [T]he Florida sentencing statute does not make a defendant eligible for death until "findings by the court that such person shall be punished by death." Fla. Stat. § 775.082(1) (emphasis added) . . . . The State cannot now treat the advisory recommendation by the jury as the necessary factual finding that *Ring* requires.
>
> 2016 WL 112683, at *6.
>
> Alabama's capital sentencing scheme similarly assigns a decisive, central role to the trial court. *Hurst* thus confirms the correctness of Mr. Miller's argument that the jury's advisory verdict cannot satisfy *Ring*. Pet. ¶¶ 413-15.

(Doc. 41, at 4-5).

In *Hurst*, the Supreme Court held that in light of *Ring*, Florida's death penalty scheme violated the defendant's Sixth Amendment right to an impartial jury because it "required the judge alone to find the existence of an aggravating circumstance." *Hurst*, 136 S. Ct. at 624. Miller maintains that "*Hurst* confirms *Ring*'s holding that a jury must find all facts that make a defendant eligible for the death penalty, and illustrates that under *Ring*, an advisory jury verdict does not satisfy the Sixth Amendment's requirements." (Doc. 41, at 4).

First, *Hurst* does not apply retroactively to Miller, because his conviction was final before the decision in *Hurst* was announced. *See Teague v. Lane*, 489 U.S. 288, 310-11 (1989). The Supreme Court has not indicated that the rule announced in *Hurst* is retroactive. Further, the Supreme Court has held that "*Ring* announced a new procedural rule that does not apply retroactively to cases final on direct review." *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004). Likewise, *Hurst*, which applied *Ring* in Florida, is not retroactive. *Lambrix v. Sec'y, Florida Dep't of Corr.*, No. 16-10251, 2017 WL 992416 at *4 n.2 (11th Cir. March 15, 2017) ("*Hurst*, like *Ring*, is not retroactively applicable on collateral review."). *See also Lotter v. Britten*, 4:04CV3187, 2017 WL 744554 at *2 (D. Neb., Feb. 24, 2017) ("[T]here is no precedent or reason to believe that *Hurst* would be made retroactive when *Ring* was

not made retroactive."); *McKnight v. Bobby*, Case No. 2:09-cv-059, 2017 WL 631411 at *5 (S.D. Ohio, Feb. 15, 2017) ("*Hurst* does not apply to cases in which the conviction became final on direct appeal before January 2016 . . ."); *Chappell v. Ryan*, No. CV-15-00478-PHX-SPL, 2017 WL 432542 at *3 (D. Ariz., Feb. 1, 2017) ("*Hurst*, which applies *Ring* in Florida, is also nonretroactive.").

Further, even if *Hurst* were to apply retroactively to Miller, this claim lacks merit. As the Alabama Supreme Court recently explained, Alabama's capital sentencing scheme complies with the Sixth Amendment:

> As previously recognized, *Apprendi* holds that any fact that elevates a defendant's sentence above the range established by a jury's verdict must be determined by the jury. *Ring* holds that the Sixth Amendment right to a jury trial requires that a jury "find an aggravating circumstance necessary for imposition of the death penalty." *Ring*, 536 U.S. at 585, 122 S.Ct. 2428. *Hurst* applies *Ring* and reiterates that a jury, not a judge, must find the existence of an aggravating factor to make a defendant death-eligible. *Ring* and *Hurst* require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty – the plain language in those cases requires nothing more and nothing less. Accordingly, because in Alabama a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defendant death-eligible, Alabama's capital-sentencing scheme does not violate the Sixth Amendment.

In re Bohannon v. State, No. 1150640, 2016 WL 5817692, at *5 (Ala. Sept. 30, 2016).

Next, Miller argues that *Ring* requires that the jury find beyond a reasonable doubt *both* the existence of an aggravating circumstance *and* that the aggravating circumstances outweigh the mitigating circumstances. (Doc. 1, at 150-51).[36] Miller contends that, because the jury was not instructed that it must find beyond a reasonable doubt that the aggravating factor outweighed the mitigating factors, his death sentence violates *Ring.* (*Id*. at 152). This claim also has no merit.

Ring only requires that "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." 536 U.S. at 602. Under Alabama's sentencing scheme, the jury's weighing of the aggravating and mitigating circumstances does not make a defendant eligible for a death sentence. Instead, the jury's *finding* of an aggravating circumstance is determinative. *See* Ala. Code § 13A–5–45(f) ("Unless at least one aggravating circumstance as defined in Section 13A–5–49 exists, the sentence shall be life imprisonment without parole."). The trial judge may disregard the jury's balancing of the mitigating and aggravating factors. *See* Ala Code § 13A–5–47(e) ("While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court."). Accordingly, the jury's determination of whether the aggravating factors outweighed

[36] He adds that *Hurst* confirms that *Ring* requires the jury to find "all facts necessary to sentence a defendant to death." (Doc. 41, at 8).

the mitigating factors could not have increased the maximum sentence for which Miller was eligible. Therefore, *Ring* does not require a jury to find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors, and this claim lacks merit.

Miller further argues that the "jury's 10-2 vote, as reflected in the general verdict form used in Mr. Miller's case, failed to indicate what findings, if any, the jury made in support of Mr. Miller's death sentence." (Doc 1, at 152). Miller argues that verifiable jury findings do not support his death sentence as required by *Ring* because the jury was not required to enumerate explicitly in its advisory verdict that it unanimously found the existence of a statutory aggravating factor beyond a reasonable doubt. (*Id*.; Doc. 41 at 7-8). Miller contends that the jury's split recommendation creates doubt as to whether all of the jurors found the aggravating circumstance. In support of this contention, Miller points out that during the course of the jury's deliberations, the jury sent a note to the court that read, "can we have a sentence if we have the appropriate number of required votes but we have one juror undecided?" (*Id*.) (quoting R. Vol. 8, Tab 26, at 1446). Miller adds that "*Hurst* confirms that a general verdict recommending the death penalty, without any specific findings, violates *Ring*." (Doc. 41 at 6). He maintains that the jury did not make a specific factual finding that his crime was especially heinous. (*Id*. at 7).

This court recognizes that a system in which the jury must explicitly indicate that it found the existence of an aggravating factor would be preferable. Indeed, the Alabama Supreme Court has recognized as much. *See Ex Parte McGriff*, 908 So. 2d 1024, 1038 (Ala. 2004) (directing lower court to provide a jury form requiring the jury to indicate whether it found the existence of an aggravating factor beyond a reasonable doubt). However, as addressed previously, the trial court instructed the jury that before determining whether to recommend the death sentence, the jury must first unanimously find the existence of an aggravating factor beyond a reasonable doubt. (R. Vol. 8, Tab 27, at 1433, 1439). The fact that ten out of the twelve jurors recommended death supports the presumption that the jurors must have found the existence of the aggravating circumstance beyond a reasonable doubt. *See Evans v. Sec'y, Fla. Dep't Of Corr.*, 699 F.3d 1249, 1260 (11th Cir. 2012) ("The jury's verdict necessarily contained [findings than an aggravating circumstance existed] because the jury was instructed that it could not recommend a death sentence unless it found beyond a reasonable doubt that one or more aggravating circumstances existed . . . ."); *United States v. Townsend*, 630 F.3d 1003, 1013-14 (11th Cir. 2011) (finding that because the court instructed the jury that it must make a prerequisite finding as to the existence of an element before convicting the defendant, the jury's guilty verdict necessarily meant the jurors found the element).

Because the jury must have found the existence of the aggravating factor beyond a reasonable doubt before considering a recommendation of the death penalty, Miller's death sentence does not violate *Ring*. Therefore, the state court's rejection of this claim was reasonable, and Miller is not entitled to relief.

VII. CONCLUSION

Based on the foregoing, the petition for writ of habeas corpus is due to be **DENIED**. A separate final judgment will be entered contemporaneously with this Memorandum Opinion.

Rule 11(a) of the Rules Governing Section 2254 Cases requires the district court to issue or deny a certificate of appealability when it enters a final order adverse to the applicant. This court may issue a certificate of appealability "only if the applicant has a made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). To make such a showing, a "petitioner must demonstrate that reasonable jurist would find the district court's assessment of the constitutional claims debatable and wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that "the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotations omitted).

This court finds that Miller's claims do not satisfy either standard. Accordingly, a motion for a certificate of appealability is due to be **DENIED**.

DONE and **ORDERED** this 29th day of March, 2017.

Karon O. Bowdre

KARON OWEN BOWDRE
CHIEF UNITED STATES DISTRICT JUDGE

FILED
2017 Mar-29 AM 11:32
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ALAN EUGENE MILLER,	)	
	)	
Petitioner,	)	
	)	**CIVIL ACTION NO.**
v.	)	**2:13-00154-KOB**
	)	
KIM T. THOMAS, Commissioner of the Alabama Department of Corrections,	)	
	)	
Respondent.	)	

FINAL JUDGMENT

For the reasons stated in the accompanying Memorandum of Opinion, the court **DENIES** Alan Eugene Miller's Petition for Writ of Habeas Corpus.

DONE and **ORDERED** this 29th day of March, 2017.

Karon O. Bowdre

KARON OWEN BOWDRE
CHIEF UNITED STATES DISTRICT JUDGE

99 So.3d 349
Court of Criminal Appeals of Alabama.

Alan Eugene MILLER
v.
STATE of Alabama.

CR–08–1413.
|
July 8, 2011.
|
Rehearing Denied Oct. 21, 2011.
|
Certiorari Quashed in Part and
Denied in Part June 22, 2012
Alabama Supreme Court 1110110.

Synopsis

Background: After defendant's convictions for capital murder were affirmed, 913 So.2d 1148, defendant petitioned for postconviction relief. The Circuit Court, Shelby County, No. CC–99–792.60, G. Daniel Reeves, J., denied petition. Defendant appealed.

Holdings: The Court of Criminal Appeals, Kellum, J., held that:

[1] defendant's due-process rights were not violated by the circuit court's adoption of the State's proposed order denying his petition for postconviction relief;

[2] defendant's appellate counsel was not ineffective; and

[3] defendant's trial counsel was not ineffective.

Affirmed.

Joiner, J., recused himself.

West Headnotes (33)

[1] **Criminal Law** Nature of Remedy
Criminal Law Civil or criminal nature

Postconviction relief is even further removed from the criminal trial than is discretionary direct review; it is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature.

[2] **Criminal Law** Constitutional, Statutory, and Regulatory Provisions

Postconviction state collateral review itself is not a constitutional right, even in capital cases.

[3] **Criminal Law** Nature of Remedy
Criminal Law Civil or criminal nature

A postconviction proceeding is not an appeal of a criminal conviction but, rather, a collateral civil attack on the judgment.

[4] **Criminal Law** Matters which either were or could have been adjudicated previously, in general

Postconviction review is a narrow remedy, since res judicata bars any claim that was or could have been raised at trial or on direct appeal.

[5] **Criminal Law** Post-conviction relief

The plain-error standard of review does not apply to a postconviction petition attacking a capital-murder conviction and death sentence.

1 Cases that cite this headnote

[6] **Criminal Law** Records

In reviewing defendant's claims in appeal of denial of postconviction relief, Court of Criminal Appeals may take judicial notice of the court's records from defendant's direct appeal.

[7] **Constitutional Law** Post-conviction relief
Criminal Law Findings

Defendant's due-process rights were not violated by the circuit court's adoption of the State's

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proposed order denying his petition for postconviction relief; the circuit court did not base its order denying defendant's petition upon the State's initial answer to the petition, but, rather, after numerous pleadings and after the evidentiary hearing on defendant's claims, the court allowed submission of post-hearing briefs, and the circuit court did not issue its final order until several months after defendant filed his reply brief. U.S.C.A. Const.Amend. 14; Rules Crim.Proc., Rule 32.1.

9 Cases that cite this headnote

[8] **Criminal Law** New trial motion

Assuming defendant's appellate counsel was deficient in asserting claims of ineffective assistance of trial counsel in the motion for a new trial without having sufficient time to prepare a comprehensive case to support those claims, defendant was not prejudiced by such conduct so as to support a claim of ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[9] **Criminal Law** Appeal

Defendant's appellate counsel was not deficient in investigating claim that trial counsel was ineffective; appellate counsel went to great lengths to fully investigate the issue of ineffectiveness of trial counsel during the hearing on defendant's motion for new trial. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[10] **Criminal Law** Competence to stand trial; sanity hearing

Defendant's trial counsel was not ineffective for failing to provide psychiatrist with the entire case file of other psychiatrist who evaluated defendant for the purpose of assessing defendant's competence to stand trial and his mental state at the time of the murders, where there was no evidence that counsel had access to or could have obtained the underlying file. U.S.C.A. Const.Amend. 6.

[11] **Criminal Law** Competence to stand trial; sanity hearing

Defendant was not prejudiced by trial counsel's failure to apprise psychiatrist with report from state-appointed psychiatrist, who evaluated defendant and concluded that defendant did not meet Alabama's definition of "insanity" at the time of the shootings, so as to support claim of ineffective assistance, where the record indicated psychiatrist had knowledge of substantially the same information contained in the report. U.S.C.A. Const.Amend. 6.

[12] **Criminal Law** Competence to stand trial; sanity hearing

Defendant was not prejudiced by trial counsel's failure to provide psychiatrist with defendant's family's mental-health records so as to support ineffective-assistance claim; there was no evidence that specific psychiatric diagnoses in defendant's family's medical records would have changed psychiatrist's determination that defendant was sane at the time of murders. U.S.C.A. Const.Amend. 6.

[13] **Criminal Law** Experts; opinion testimony

Defendant was not prejudiced by trial counsel's failure to provide psychiatrist with comprehensive information concerning the trauma he suffered from his father so as to support ineffective-assistance claim; the record indicated that psychiatrist was aware of the nature of father's physical abuse. U.S.C.A. Const.Amend. 6.

[14] **Criminal Law** Experts; opinion testimony

Defendant's trial counsel did not render ineffective assistance by not expending valuable, limited resources in pursuit of a fifth mental-health expert who may or may not have found that defendant met Alabama's legal definition of "insanity" at the time of the shootings; trial counsel had four opinions from mental-health

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experts, each of whom had evaluated defendant and concluded that he did not meet Alabama's legal definition of "insanity" at the time of the crimes. U.S.C.A. Const.Amend. 6.

[15] **Criminal Law** Experts; opinion testimony

Counsel is not ineffective for relying on an expert's opinion. U.S.C.A. Const.Amend. 6.

[16] **Criminal Law** Right to counsel

A postconviction petition does not show ineffective assistance merely because it presents a new expert opinion that is different from the theory used at trial. U.S.C.A. Const.Amend. 6.

[17] **Criminal Law** Argument and Conduct of Defense Counsel

Trial counsel's opening statement at guilt phase of capital-murder trial did not constitute ineffective assistance; counsel's opening statement was the product of a reasonable, strategic decision to win favor with the jury by not presenting frivolous arguments in order to spare defendant's life. U.S.C.A. Const.Amend. 6.

[18] **Criminal Law** Deficient representation in general

The American Bar Association Guidelines may provide guidance as to what is reasonable in terms of counsel's representation, but they are not determinative. U.S.C.A. Const.Amend. 6.

[19] **Criminal Law** Adequacy of investigation of mitigating circumstances

Trial counsel was not deficient in failing to adequately interview defendant and his family in capital-murder trial for purposes of ineffective-assistance claim; trial counsel met with defendant personally at least half a dozen times, and counsel interviewed defendant's family members such as his father, mother, and his sisters with the specific focus of uncovering general background information and facts concerning defendant's relationship with his father. U.S.C.A. Const.Amend. 6.

[20] **Criminal Law** Adequacy of investigation of mitigating circumstances

Trial counsel did not render ineffective assistance in investigating potential mitigating evidence for penalty phase of capital-murder trial. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[21] **Criminal Law** Adequacy of investigation of sentencing issues

Criminal Law Presentation of evidence regarding sentencing

Failure to investigate possible mitigating factors and failure to present mitigating evidence at sentencing can constitute ineffective assistance of counsel under the Sixth Amendment. U.S.C.A. Const.Amend. 6.

[22] **Criminal Law** Presentation of evidence in sentencing phase

Trial counsel was not ineffective during penalty phase of capital-murder trial by failing to present additional mitigating evidence; mitigation evidence presented by counsel was a matter of trial strategy. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[23] **Criminal Law** Presentation of evidence regarding sentencing

Trial counsel is afforded broad authority in determining what evidence will be offered in mitigation.

[24] **Criminal Law** Introduction of and Objections to Evidence at Trial

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The failure to present evidence that is merely cumulative to that that was presented at trial is, generally speaking, not indicative of ineffective assistance of trial counsel. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[25] **Criminal Law** Presentation of evidence regarding sentencing

Counsel is not required to present all mitigation evidence, even if the additional mitigation evidence would not have been incompatible with counsel's strategy; counsel must be permitted to weed out some arguments to stress others and advocate effectively. U.S.C.A. Const.Amend. 6.

[26] **Criminal Law** Death Penalty

When claims of ineffective assistance of counsel involve the penalty phase of a capital-murder trial the focus is on whether the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. U.S.C.A. Const.Amend. 6.

[27] **Criminal Law** Presentation of evidence in sentencing phase

An attorney's performance is not per se ineffective for failing to present mitigating evidence at the penalty phase of a capital trial.

[28] **Criminal Law** Argument and comments

Trial counsel did not render ineffective assistance during penalty-phase opening statement in capital-murder trial; consistent with counsel's trial strategy, counsel elected to acknowledge doctor's conclusion that there was no basis under Alabama law to support an insanity defense in an effort to retain his credibility before the jury and to secure an advisory verdict of life imprisonment without parole, rather than the death sentence. U.S.C.A. Const.Amend. 6.

[29] **Criminal Law** Jury selection and composition

Trial counsel's voir dire examination in capital-murder trial did not amount to ineffective assistance; counsel strategically conducted voir dire to determine whether any juror had a fixed opinion, for any reason, of the case. U.S.C.A. Const.Amend. 6.

[30] **Criminal Law** Argument and comments

Trial counsel did not render ineffective assistance during guilt-phase closing argument in capital-murder trial; counsel's decision to not argue that defendant did not have intent to commit capital murder during closing arguments was consistent with his overall trial strategy of focusing on the penalty phase of the trial. U.S.C.A. Const.Amend. 6.

[31] **Criminal Law** Post-conviction relief

Defendant's claim that appellate counsel should have argued that his trial counsel were ineffective because trial counsel did not move for a directed verdict based on the State's failure to present comparative evidence necessary to determine that the killings were especially heinous, atrocious, or cruel compared to other capital offenses was not properly before the appellate court for review, where he failed to raise the claim in his postconviction-relief petition. Rules Crim.Proc., Rule 32.1.

2 Cases that cite this headnote

[32] **Sentencing and Punishment** Sufficiency

State was not required to present pertinent facts from other capital cases for comparison purposes in order to sustain its burden of proving that the defendant's offense was especially heinous, atrocious, or cruel when compared to other capital offenses.

[33] **Criminal Law** Presentation of evidence in sentencing phase

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Trial counsel was not ineffective in capital-murder case for failing to present additional mitigating evidence during sentencing; trial counsel presented a competent mitigating case concerning defendant's mental health and background during the penalty phase of the trial. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

Attorneys and Law Firms

***352** Robin Ann Adams and Audrey Y. Dupont, Birmingham; James S. Whitehead and William Tran (withdrew 12/09/2010), Chicago, Illinois; and Michael Bartolic, Chicago, Illinois, for appellant.

Troy King, atty. gen., and Thomas R. Govan, asst. atty. gen., for appellee.

Opinion

KELLUM, Judge.

The appellant, Alan Eugene Miller, an inmate on death row at Holman Correctional Facility, appeals the circuit court's denial of his petition for postconviction relief filed pursuant to Rule 32, Ala. R.Crim. P.

In June 2000, Miller was convicted of capital murder in connection with the deaths of Lee Michael Holdbrooks, Christopher S. Yancy, and Terry Lee Jarvis. The murders were made capital because they were committed "by one act or pursuant to one scheme or course of conduct." See § 13A–5–40(a)(10), Ala.Code 1975. Following the penalty phase of Miller's trial, the jury recommended, by a vote of 10–2, that Miller be sentenced to death. The circuit court accepted the jury's recommendation and sentenced Miller to death.

This Court affirmed Miller's conviction and sentence on direct appeal. See *Miller v. State,* 913 So.2d 1148 (Ala.Crim.App.2004). The Alabama Supreme Court denied certiorari review on May 27, 2005, and this Court's certificate of judgment was issued that same day. The United States Supreme Court subsequently denied certiorari review in January 2006. *Miller v. Alabama,* 546 U.S. 1097, 126 S.Ct. 1024, 163 L.Ed.2d 867 (2006).

***353** On May 19, 2006, Miller, through counsel, filed a timely Rule 32 petition in the Shelby Circuit Court. The State answered Miller's petition. On April 4, 2007, Miller filed the amended Rule 32 petition that is the subject of this appeal, in which he reasserted and expanded the claims asserted in his original Rule 32 petition. In the amended petition, Miller claimed, among other things, that he received ineffective assistance of trial and appellate counsel.

On April 18, 2007, the State filed an answer and a motion to dismiss Miller's amended petition, and Miller responded. Following a hearing on the State's motion to dismiss, the circuit court entered a written order dismissing all Miller's claims, except his claims of ineffective assistance of appellate counsel.

On February 11–14, 2008, an evidentiary hearing was conducted on Miller's claims of ineffective assistance of appellate counsel. Miller presented the testimony of the following witnesses: Mickey Johnson, Miller's trial counsel; Dr. Charles Scott, the psychiatrist retained to evaluate Miller before trial; Barbara Miller, Miller's mother; George Carr, Jr., Alicia Sanford, Cheryl Ellison, Samuel Brian Miller, Richard Miller, and Jacob Connell, various Miller family members; and Dr. Catherine Boyer, Miller's psychologist for his Rule 32 proceeding. The State presented the testimony of Dr. Harry McClaren, another psychologist who examined Miller before trial who reviewed additional documents for the Rule 32 proceedings, and Ronnie Blackwood, Miller's other trial counsel.[1] Because more time was needed to present evidence, the hearing had to be continued.

The evidentiary hearing resumed on August 6, 2008. Miller presented the testimony of his appellate counsel, Billy Hill. The State presented the testimony of Miller's other appellate counsel, Haran Lowe.

Following the evidentiary hearing, counsel for the respective parties submitted post-hearing briefs for the circuit court's consideration. On May 5, 2009, the circuit court denied Miller's petition in a 157–page order. Miller subsequently filed an objection to the court's order, which the circuit court denied. This appeal followed.

In the original opinion affirming Miller's conviction and death sentence, this Court set out the facts of the crime. See *Miller,* 913 So.2d at 1154–57.

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Standard of Review

[1] **[2]** **[3]** **[4]** " 'Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature. See *Fay v. Noia,* 372 U.S. 391, 423–424, 83 S.Ct. 822, 841, 9 L.Ed.2d 837 (1963). It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction. States have no obligation to provide this avenue of relief....'

"*Pennsylvania v. Finley,* 481 U.S. 551, 556–57, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987).

" '[P]ostconviction state collateral review itself is not a constitutional right, even in capital cases. *Murray v. Giarratano* (1989), 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1; *Pennsylvania v. Finley* (1987), 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539. A postconviction proceeding is not an appeal ***354** of a criminal conviction, but, rather, a collateral civil attack on the judgment. See *State v. Crowder* (1991), 60 Ohio St.3d 151, 573 N.E.2d 652. Postconviction review is a narrow remedy, since res judicata bars any claim that was or could have been raised at trial or on direct appeal.'

"*State v. Steffen,* 70 Ohio St.3d 399, 410, 639 N.E.2d 67, 76 (1994)."

James v. State, 61 So.3d 357, 362 (Ala.Crim.App.2010). According to Rule 32.3, Ala. R.Crim. P., Miller has the sole burden of pleading and proof. Rule 32.3, Ala. R.Crim. P., provides:

> "The petitioner shall have the burden of pleading and proving by a *preponderance of the evidence* the facts necessary to entitle the petitioner to relief. The State shall have the burden of pleading any ground of preclusion, but once a ground of preclusion has been pleaded, the petitioner shall have the burden of disproving its existence by a preponderance of the evidence."

(Emphasis added.) "Preponderance of the evidence" is defined as:

> "The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other."

Black's Law Dictionary 1220 (8th ed. 2004).

[5] Though we reviewed the claims on Miller's direct appeal for plain error, the plain-error standard of review does not apply to a postconviction petition attacking a capital-murder conviction and death sentence. See *Ferguson v. State,* 13 So.3d 418, 424 (Ala.Crim.App.2008); *Waldrop v. State,* 987 So.2d 1186 (Ala.Crim.App.2007); *Hall v. State,* 979 So.2d 125 (Ala.Crim.App.2007); *Gaddy v. State,* 952 So.2d 1149 (Ala.Crim.App.2006). "In addition, '[t]he procedural bars of Rule 32 apply with equal force to all cases, including those in which the death penalty has been imposed.' " *Brownlee v. State,* 666 So.2d 91, 93 (Ala.Crim.App.1995). When reviewing the circuit court's ruling on the claims raised in Miller's postconviction petition, we apply an abuse-of-discretion standard. *Gaddy,* 952 So.2d at 1154.

[6] Finally, we note that in reviewing Miller's claims in appeal, this Court may take judicial notice of this Court's records from Miller's direct appeal to this Court. *Hull v. State,* 607 So.2d 369, 371 n. 1 (Ala.Crim.App.1992).

I.

Miller argues that the circuit court erred in adopting, with only minor modifications, the State's proposed order denying his

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Rule 32 petition. (Miller's brief, at 14–18; Miller's reply brief, at 8–11.)

Following the evidentiary hearing on Miller's Rule 32 petition, the parties submitted post-hearing briefs. The State also submitted a proposed order denying Millers' Rule 32 petition, which was essentially a reformatted version of the State's post-hearing brief. Miller filed a reply brief. In his reply brief, Miller did not object to the fact that the State had submitted a proposed order for the court's consideration, nor did he file a proposed order.

On May 5, 2009—several months after the submission of the post-hearing briefs and the State's proposed order—the circuit court entered an order denying Miller's Rule 32 petition. The court's order ***355** adopted the State's previously submitted proposed order, with very few modifications. Miller filed an objection to the circuit court's adopting the State's proposed order as its order. The circuit court denied Miller's objection by the following written order:

> "The Court denies 'Petitioner's Objection to the Court's Adoption of the State's Legal and Factual Assertions to Deny the Amended Rule 32 Petition.'
>
> "The Court spent many hours carefully listening to the testimony presented in the hearing on the petition. The Court read, and often re-read, each of the submissions offered by the Petitioner and the State. The Court carefully weighed each of the arguments put forth in all the submissions. The Court found none of the Petitioner's arguments persuasive when considered together with the testimony given at the hearing and the argument made by the State. Contrary to the assertions of the Petitioner, case law is clear and unambiguous that adopting in whole or in part an order proposed by the State is not error. *Hooks v. State* [21 So.3d 772] (Ala.Crim.App.2008).
>
> "For the Foregoing [reasons] the 'Objection' is denied."

(C. 2117; 2131.)

[7] On appeal, Miller reasserts his argument that his due-process rights were violated by the circuit court's adopting the State's proposed order denying his petition for postconviction relief. Miller contends that because the circuit court adopted the State's proposed order, which was filed before the circuit court received Miller's post-hearing reply brief, neither he nor this Court "can have any confidence in the trial court's after-the-fact assurance that it read each of the submissions offered by the parties and [that the court] carefully weighed the arguments before finding 'none of the Petitioner's arguments [to be] persuasive.' " (Miller's brief, at 17–18.) Miller maintains that the circuit court ceded its duty to independently review and assess his claims; therefore, he asserts, this Court should review his claims de novo and we should afford no deference to the circuit court's findings.

In the recent case of *Ray v. State,* 80 So.3d 965 (Ala.Crim.App.2011), this Court addressed the assertion that the circuit court erred in adopting the State's proposed order denying his Rule 32 petition. We rejected Ray's claim, reasoning:

> " 'While the practice of adopting the state's proposed findings and conclusions is subject to criticism, the general rule is that even when the court adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous. *Anderson v. City of Bessemer City, N.C.,* 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); *Hubbard v. State,* 584 So.2d 895 (Ala.Cr.App.1991); *Weeks v. State,* 568 So.2d 864 (Ala.Cr.App.1989), cert. denied, [498] U.S. [882], 498 U.S. 882, 111 S.Ct. 230, 112 L.Ed.2d 184 (1990); *Morrison v. State,* 551 So.2d 435 (Ala.Cr.App.), cert. denied, 495 U.S. 911, 110 S.Ct. 1938, 109 L.Ed.2d 301 (1990).'
>
> "*Bell v. State,* 593 So.2d 123, 126 (Ala.Crim.App.1991). See also *Dobyne v. State,* 805 So.2d 733, 741 (Ala.Crim.App.2000); *Jones v. State,* 753 So.2d 1174, 1180 (Ala.Crim.App.1999).
>
> "More recently in *Hyde v. State,* 950 So.2d 344 (Ala.Crim.App.2006), we stated:
>
> " '[T]his Court has repeatedly upheld the practice of adopting the State's proposed order when denying a Rule 32 petition for postconviction relief. See, e.g., *Coral v. State,* 900 So.2d 1274, 1288 (Ala.Crim.App.2004), ***356** overruled on other grounds, *Ex parte Jenkins,* 972 So.2d 159 (Ala.2005), and the cases cited therein. "Alabama courts have consistently held that even when a trial court adopts verbatim a party's proposed order, the findings of fact and conclusions of law are those of the trial court and they may be reversed only if they are

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clearly erroneous." *McGahee v. State,* 885 So.2d 191, 229–30 (Ala.Crim.App.2003).'

"950 So.2d at 371.

"However, the Alabama Supreme Court has admonished that 'appellate courts must be careful to evaluate a claim that a prepared order drafted by the prevailing party and adopted by the trial court verbatim does not reflect the independent and impartial findings and conclusions of the trial court.' *Ex parte Ingram,* 51 So.3d 1119, 1124 (Ala.2010).

"In *Ingram,* the Supreme Court held that the circuit court's adoption of the State's proposed order denying postconviction relief was erroneous because, it said, the order stated that it was based in part on the personal knowledge and observations of the trial judge when the judge who actually signed the order denying the postconviction petition was not the same judge who had presided over Ingram's capital-murder trial. '[T]he patently erroneous nature of the statements regarding the trial judge's "personal knowledge" and observations of Ingram's capital-murder trial undermines any confidence that the trial judge's findings of fact and conclusions of law are the product of the trial judge's independent judgment....' *Ingram,* 51 So.3d at 1125.

"Our first opportunity to consider this issue after the Supreme Court's decision in *Ingram* came in *James v. State,* 61 So.3d 357 (Ala.Crim.App.2010) (opinion on application for rehearing). We upheld a circuit court's order, adopted verbatim from the State's proposed order, over a claim that in adopting the State's order the circuit court had violated *Ingram* and the United States Supreme Court's opinion in *Jefferson v. Upton,* 560 U.S. 284, 130 S.Ct. 2217, 176 L.Ed.2d 1032 (2010). We stated:

> " 'The main concerns the Supreme Court found objectionable in *Ingram* are not present in this case; here, the same judge presided over both James's trial and the Rule 32 proceedings. Also, as we noted in our previous opinion in this case, the circuit court allowed both "parties to submit proposed orders."
>
> " 'In *Jefferson v. Upton,* [560 U.S. 284, 130 S.Ct. 2217 (2010),] the United States Supreme Court remanded Jefferson's habeas corpus proceedings to the lower court for that court to determine whether the state court's factual findings warranted a presumption of correctness. The Supreme Court in granting relief stated:
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> > " ' " 'Although we have stated that a court's 'verbatim adoption of findings of fact prepared by prevailing parties' should be treated as findings of the court, we have also criticized that practice. *Anderson* [*v. Bessemer City*], 470 U.S. [564] at 572, 105 S.Ct. 1504, 84 L.Ed.2d 518 [(1985)]. And we have not considered the lawfulness of, nor the application of the habeas statute to, the use of such a practice where (1) a judge solicits the proposed findings ex parte, (2) does not provide the opposing party an opportunity to criticize the findings or to submit his own, or (3) adopts findings that contain internal evidence suggesting that the judge ***357** may not have read them. Cf. *id.,* at 568, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518; Ga.Code of Judicial Conduct, Canon 3(A)(4) (1993) (prohibiting ex parte judicial communications)." '
>
> "*James v. State,* 61 So.3d at 385 (on rehearing).
>
> "Here, the circuit judge who signed the order denying postconviction relief was the same judge who presided over Ray's guilt and penalty proceedings—the judge who sentenced Ray to death. None of the concerns the Supreme Court stressed in *Ingram* are present in this case. Moreover, for the reasons detailed in this opinion, we hold that the circuit court's findings are not 'clearly erroneous.' "

Ray, 80 So.3d at 971–72.

Shortly after this Court released *Ray,* the Alabama Supreme Court released its opinion in *Ex parte Scott,* [Ms. 1091275, March 18, 2011] —— So.3d —— (Ala.2011). In *Scott,* the Alabama Supreme Court held that a circuit court's order summarily dismissing a Rule 32 petition, which adopted verbatim the State's *answer* to the Rule 32 petition, violated the requirement that the order reflect the circuit court's independent findings and conclusions of law.

In *Scott,* after the State filed its answer to Scott's Rule 32 petition, the circuit court requested and received an electronic copy of the State's answer. The circuit court subsequently

issued a written order summarily denying Scott's Rule 32 petition. The circuit court's order essentially adopted verbatim the State's answer to the Rule 32 petition.

Scott filed an objection to the circuit court's order, which the circuit court denied. This Court affirmed the circuit court's order denying Scott's Rule 32 petition. *Scott v. State,* [Ms. CR–06–2233, March 26, 2010] ––So.3d –– (Ala.Crim.App.2010). The Alabama Supreme Court granted Scott's petition for a writ of certiorari and held that the circuit court's adoption of the State's answer to the Rule 32 petition conflicted with its decision in *Ex parte Ingram,* 51 So.3d 1119 (Ala.2010). The Court reasoned:

> "Scott argues that the trial court's order contains the same citation to caselaw that had been overruled by this Court two years before the entry of the trial court's order and the same typographical errors as contained in the State's answer. Moreover, Scott contends that because the trial court adopted nearly verbatim the State's answer as its order, the order is infected with the adversarial zeal of the State's counsel. Thus, Scott argues that the trial court's order cannot reflect the independent and impartial findings of the trial court and cannot be the product of the trial court's independent judgment. As for Scott's claim that the presence in the trial court's order of the same typographical errors contained in the State's answer is evidence that the trial court's order is not a product of the independent judgment of the trial court, we note that Scott has directed this Court to only two examples of such typographical errors appearing in the approximately 58 pages of text that constitute the State's answer and the trial court's order. This Court recognized in *Ex parte Ingram*[, 51 So.3d 1119 (Ala.2010),] that sometimes minor errors find their way into orders drafted by trial courts. We do not consider the few typographical errors at issue here, by themselves, as sufficient evidence upon which to base a conclusion that the trial court's order is not a product of the trial court's independent judgment. The fact that the same typographical errors appear in the same locations in both the State's answer and the trial court's order does, ***358** however, bolster this Court's conclusion reached *infra* that the trial court's order is not a product of its independent judgment. We also note that the State's answer and the trial court's order are both 58 pages in length. Again, although this fact alone is insufficient evidence upon which to base a conclusion that the order is not a product of the trial court's independent judgment, it bolsters this Court's conclusion reached *infra* that the trial court's order is not a product of its independent judgment.
>
> "Further, Scott notes that in adopting the State's answer the trial court repeated in its order the State's citation to and reliance upon *Williams v. State,* 783 So.2d 108 (Ala.Crim.App.2000), a case that had been overruled by this Court approximately two years before the trial court entered its order in this case. In *Ex parte Taylor,* 10 So.3d 1075 (Ala.2005), this Court by implication overruled the Court of Criminal Appeals' holding in *Williams* that ' "a finding of no manifest injustice under the 'plain error' standard on a direct appeal serves to establish a finding of no prejudice under the test for ineffective assistance of counsel provided in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)." ' *Williams,* 783 So.2d at 133 (quoting *State v. Clark,* 913 S.W.2d 399, 406 (Mo.Ct.App.1996) (footnote omitted)). The trial court did not cite *Williams* for purposes of that holding; rather, it is clear that *Williams* was cited in support of the trial court's conclusion that Scott had failed to satisfy his burden of pleading under Rule 32. There is no error in citing and relying upon a case for a particular proposition of law when that case has been reversed on a ground other than the specific proposition of law being relied upon. The trial court's citation to *Williams* in this case does not rise to the level of a material and obvious error as contemplated by the holding in *Ex parte Ingram,* supra. Accordingly, we do not consider the trial court's citation to *Williams* as evidence indicating that the trial court's order is not a product of the trial court's independent judgment.
>
> "More troubling is Scott's contention that because the trial court adopted verbatim the State's answer as its order, the order is infected with the same adversarial zeal of the State's counsel as is the answer. Scott contends that, although an order prepared by a party for the proposed adoption by the trial court purports to be disinterested, the adversarial zeal of counsel all too often infects the adopted order of the trial court, which is supposed to contain disinterested findings. See *Cuthbertson v. Biggers Bros., Inc.,* 702 F.2d 454 (4th Cir.1983). Scott contends that an answer is a pleading that never is prepared with the pretense of impartiality. We agree. As Scott contends, an answer, by its very nature, is adversarial and

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sets forth one party's position in the litigation. It makes no claim of being an impartial consideration of the facts and law; rather, it is a work of advocacy that exhorts one party's perception of the law as it pertains to the relevant facts. The Court of Criminal Appeals acknowledged the nature of the State's answer in this case, stating that 'the pleading clearly advocated and sought summary dismissal of the majority of Scott's claims.' *Scott v. State,* ——So.3d at ——.

"This Court stated in *Ex parte Ingram* that the 'appellate courts must be careful to evaluate a claim *that a prepared order* drafted by the prevailing party and adopted by the trial court verbatim *does not reflect the independent* ***359** *and impartial findings and conclusions of the trial court.*' *Ex parte Ingram,* 51 So.3d at 1124 (emphasis added). Here, we do not even have the benefit of an order proposed or 'prepared' by a party; rather the order is a judicial incorporation of a party's pleading as the 'independent and impartial findings and conclusions of the trial court.' *Id.* at 1124. The first and most fundamental requirement of the reviewing court is to determine 'that the order and the findings and conclusions in such order are in fact those of the trial court.' *Id.* at 1124. The trial court's verbatim adoption of the State's answer to Scott's Rule 32 petition as its order, by its nature, violates this Court's holding in *Ex parte Ingram.* Accordingly, we must reverse the Court of Criminal Appeals' judgment insofar as it affirms the trial court's adoption of the State's answer as its order, and we remand the case to the Court of Criminal Appeals with directions to remand the case to the trial court for that court to reverse its order dismissing Scott's Rule 32 petition and to enter a new order in light of this opinion."

—— So.3d at ——.

The fact situation in this case is distinguishable from the fact situations in *Ex parte Ingram* and *Ex parte Scott.* Here, the circuit judge who denied Miller's Rule 32 petition did not preside at Miller's trial; however, in the order denying Miller's Rule 32 petition the court did not profess to have personal knowledge of the performance of Miller's trial counsel. Furthermore, the circuit court in this case did not base its order denying Miller's Rule 32 petition upon the State's initial *answer* to the Rule 32 petition. Rather, after numerous pleadings, and after the evidentiary hearing on Miller's Rule 32 claims, the court allowed submission of post-hearing briefs. The State submitted with its post-hearing brief a proposed order denying the petition. As stated above, Miller neither objected in his reply brief to the possibility of the circuit court's adopting the State's proposed order, nor did he file a proposed order. Although the State's proposed order was filed before Miller submitted his reply brief, this does not mean that the circuit court ignored the arguments subsequently presented in Miller's reply brief. In fact, the circuit court did not issue its final order until several months after Miller filed his reply brief. Furthermore, in response to Miller's objection to the court's adopting the State's proposed order, the circuit court specifically affirmed that it had considered *all* the pleadings filed by the parties and that it had "carefully weighed each of the arguments put forth in all the submissions" before rendering its decision. (C. 2117, 2131.)

In light of these facts, we are confident that the circuit court's order is its own and not merely an unexamined adoption of a proposed order submitted by the State. Moreover, for the reasons set forth below, we hold that the circuit court's findings are not "clearly erroneous."

II.

During his direct appeal, Miller was represented by two new attorneys who were appointed following his conviction. Miller argues that his appellate counsel rendered ineffective assistance in the motion-for-new-trial proceedings and on appeal. Although Miller presents numerous claims and subclaims of ineffective assistance of appellate counsel in his brief, and even though he often commingles claims and/or presents those claims in a different context in his brief than he presented the claims in his amended petition, Miller's arguments on appeal can essentially be grouped into four parts.

***360** First, Miller claims that because of time constraints and the lack of an available trial transcript when appellate counsel filed the motion for a new trial, his appellate counsel should not have presented ineffective-assistance-of-trial-counsel claims in the motion for a new trial. (Miller's brief, II(A), at 24–28; Miller's reply brief, at 11.) Miller maintains that his appellate counsel's ill-informed decision to raise ineffective-assistance-of-trial counsel claims in the motion for a new trial precluded those claims being later considered in a Rule 32 petition, as evidenced by the fact that the circuit court dismissed Miller's Rule 32 ineffective-assistance-of-trial-counsel claims. (Miller's brief, at 27.)

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Second, Miller argues that having made the decision to present claims of ineffective assistance of trial counsel in the motion-for-new-trial proceedings, appellate counsel had an obligation to thoroughly investigate those claims, which, Miller maintains, his appellate counsel failed to do. (Miller's brief, II(B)(1) at 28–33; Miller's reply brief, at 11–13.)

Third, Miller asserts that his appellate counsel failed to adequately argue and support the ineffective-assistance-of-trial–counsel claims that were presented in the hearing on the motion for a new trial and on appeal. (Miller's brief, II(B)(2), at 33–124; Miller's reply brief, at 13–38.) In that portion of his argument, Miller incorporates a number of his claims of ineffective assistance of trial counsel, and he argues that had his appellate counsel properly presented those ineffective-assistance-of-trial-counsel claims at the hearing on the motion for a new trial, he would have prevailed on those claims.

Fourth, Miller contends that his appellate counsel failed to present numerous additional allegations of ineffective assistance of trial counsel in the motion for a new trial. Miller alleges that had his appellate counsel properly raised and supported those additional claims in the motion-for-new-trial proceedings and on appeal, he would have been entitled to relief. (Miller's brief, II(C), at 124–48; Miller's reply brief, at 39.)

Before addressing Miller's specific claims, we set forth the general principles of law regarding ineffective-assistance-of-counsel claims.

When reviewing claims of ineffective assistance of counsel, we apply the standard articulated by the United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail on a claim of ineffective assistance of counsel, the petitioner must establish: (1) that counsel's performance was deficient; and (2) that the petitioner was prejudiced by the deficient performance. 466 U.S. at 687; *Ex parte Lawley,* 512 So.2d 1370, 1372 (Ala.1987).

> " 'Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. *Engle v. Isaac,* 456 U.S. 107, 133–34, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide ***361** range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See *Michel v. Louisiana,* [350 U.S. 91], at 101 [(1955)]. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.'
>
> "*Strickland,* 466 U.S. at 689, 104 S.Ct. 2052 (citations omitted). As the United States Supreme Court further stated:
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> > " '[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.'
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> "*Strickland,* 466 U.S. at 690–91.
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> "In *Jones v. State,* 753 So.2d 1174 (Ala.Crim.App.1999), we stated:
>
> > " 'While counsel has a duty to investigate in an attempt to locate evidence favorable to the defendant, "this duty only requires a *reasonable* investigation." *Singleton v. Thigpen,* 847 F.2d 668, 669 (11th Cir.(Ala.) 1988), cert. denied, 488 U.S. 1019, 109 S.Ct. 822, 102 L.Ed.2d 812 (1989) (emphasis added). See *Strickland* [*v.*

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Washington], 466 U.S. [668] at 691, 104 S.Ct. [2052] at 2066, 80 L.Ed.2d 674 [(1984)]; *Morrison v. State,* 551 So.2d 435 (Ala.Cr.App.1989), cert. denied, 495 U.S. 911, 110 S.Ct. 1938, 109 L.Ed.2d 301 (1990). Counsel's obligation is to conduct a "substantial investigation into each of the *plausible* lines of defense." *Strickland,* 466 U.S. at 681, 104 S.Ct. at 2061 (emphasis added). "A substantial investigation is just what the term implies; it does not demand that counsel discover every shred of evidence but that a reasonable inquiry into all plausible defenses be made." *Id.,* 466 U.S. at 686, 104 S.Ct. at 2063.

> " ' "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information."

" ' *Id.,* 466 U.S. at 691, 104 S.Ct. at 2066.'

" 753 So.2d at 1191.

" 'The purpose of ineffectiveness review is not to grade counsel's performance. See *Strickland* [*v. Washington*], [466 U.S. 668,] 104 S.Ct. [2052] at 2065 [(1984)]; see also *White v. Singletary,* 972 F.2d 1218, 1221 (11th Cir.1992) ("We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately."). We recognize that "[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or ***362** even brilliant in another." *Strickland,* [466 U.S. at 693,] 104 S.Ct. at 2067. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or "what is prudent or appropriate, but only what is constitutionally compelled." *Burger v. Kemp,* 483 U.S. 776, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987).'

" *Chandler v. United States,* 218 F.3d 1305, 1313 (11th Cir.2000) (footnote omitted)."

Ray, 80 So.3d at 975–76.

With the above principles in mind, we turn to Miller's specific allegations of ineffective assistance of appellate counsel presented on appeal.

A.

As noted above, Miller first claims that because of judicially imposed time constraints and the lack of an available trial transcript at the time the new-trial motion was filed, his appellate counsel should not have presented ineffective-assistance-of-trial-counsel claims in the motion for a new trial. (Miller's brief, II(A), at 24–28; Miller's reply brief, at 11.) Miller maintains that appellate counsel's "ill-informed" decision to assert claims of ineffective assistance of trial counsel in the motion for a new trial precluded those claims being later considered in a Rule 32 petition, as evidence by the fact that the circuit court summarily dismissed Miller's Rule 32 ineffective-assistance-of-trial-counsel claims.

The State maintains that this claim is not properly before this Court because it was not presented in Miller's amended Rule 32 petition—Miller's claim in his amended Rule 32 petition was that his appellate counsel were ineffective in their investigation and presentation of the claims of ineffective assistance of trial counsel that were presented in the motion for a new trial and on appeal, not that it was ineffective *per se* to assert claims of ineffective assistance of trial counsel in the motion for a new trial. (C. 352–56.) However, Miller's present claim was addressed in the evidentiary hearing and in the circuit court's order denying the petition. Accordingly, under these circumstances, this claim is before this Court for our consideration.

The circuit court found that Miller failed to prove that his appellate counsel were ineffective for presenting ineffective-assistance-of-counsel claims in the motion-for-new-trial proceedings and that Miller failed to establish that he was prejudiced by appellate counsel's decision to do so. We quote extensively from the circuit court's order denying relief on this claim:

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"In *Ex parte Jackson,* 598 So.2d 895 (Ala.1992), the Supreme Court of Alabama created a mechanism through which newly appointed appellate attorneys could raise ineffective assistance of trial counsel claims in a motion for new trial and on appeal. In particular, the court created an exception to the requirement, set forth in Rule 24.1(b) of the Alabama Rules of Criminal Procedure, that a motion for new trial must be filed 'no later than thirty (30) days after sentence is pronounced.' *Id.* at 897. The exception provided that newly appointed appellate attorney could file a motion, within fourteen days of being appointed to extend the 30–day time period for filing the motion for new trial. *Id.* Once that motion, known as a '*Jackson* motion,' was filed, the attorney automatically would have thirty days 'from ***363** the date the reporter's transcript is filed' to file a motion for new trial. *Id.* The court reasoned that this exception was necessary because it would enable new counsel to raise 'all appropriate issues before the trial court,' including claims alleging that the defendant's trial counsel were ineffective. *Id.* at 897–898.

"Acknowledging that the *Jackson* mechanism had created more problems in practical application than it solved, the Supreme Court of Alabama, in *Ex parte Ingram,* 675 So.2d 863, 865 (Ala.1996), overruled *Jackson* only 'to the extent that it allows newly appointed appellate counsel to move to suspend the Rule 24.1(b), Ala. R.Crim. P., 30–day jurisdictional time limit for new trial motions.' The Court did, however, strongly encourage trial judges 'to attempt to facilitate newly appointed appellate counsel's efforts to make new trial motions based upon an alleged lack of ineffective counsel before the Rule 24.1(b) time limit expires.' *Id.* Because the Court overruled *Jackson* only to the extent that it permitted a newly appointed attorney to move to suspend the Rule 24.1(b) time limit for filing a motion for new trial, the Court, in *Ingram,* left intact *Jackson*'s holding that the 'failure to include a *reasonably ascertainable issue* in a motion for new trial will result in a bar to further argument of the issue on appeal and in post-conviction proceedings.' *Jackson,* 598 So.2d at 897 (emphasis added.)

"After the Supreme Court of Alabama issued its decision in *Ingram,* the Court amended Rule 32 of the Alabama Rules of Criminal Procedure by adopting Rule 32.2(d). That rule was adopted to address claims of ineffective assistance of counsel. Rule 32.2(d) of the Alabama Rules of Criminal Procedure provides that, 'Any claim that counsel was ineffective must be raised as soon as practicable, either at trial, on direct appeal, or in the first Rule 32 petition, whichever is applicable.' *See V.R. v. State,* 852 So.2d 194, 199 n. 1 (Ala.Crim.App.2002).

"In *Russell v. State,* 886 So.2d 123, 125–26 (Ala.Crim.App.2003), the Alabama Court of Criminal Appeals held that the appellant's ineffective assistance of trial counsel claims were procedurally barred from review, under Rule 32.2(a) of the Alabama Rules of Criminal Procedure, because they reasonably could have been presented in a motion for new trial and on direct appeal. In reaching that result, the court held that a Rule 32 petitioner's ineffective assistance of trial counsel claims will be procedurally barred from review if the transcript of the trial was prepared in time for appellate counsel to raise those claims in a timely filed motion for new trial. *Id.* at 126. *Cf. V.R.,* 852 So.2d at 202 (['A] defendant is not precluded ... from raising an ineffective assistance of trial counsel claim for the first time in a Rule 32 petition if the trial transcript was not prepared in time for appellate counsel to have reviewed the transcript to ascertain whether such a claim was viable and to present the claim in a timely filed motion for a new trial.').

"In short, Alabama law provides that a defendant must raise ineffective assistance of trial counsel claims as soon as 'practicable.' *See* Ala. R.Crim. P. 32.2(d). In addition, a Rule 32 petitioner's ineffective assistance of trial counsel claims will be procedurally barred from review, under Rule 32.2(a) of the Alabama Rules of Criminal Procedure, if newly appointed appellate counsel had the trial transcript and raised (or reasonably could have raised) ineffective assistance of trial counsel claims in the trial court. That is *precisely* what occurred here.

***364** "On July 31, 2000, the trial court sentenced Miller to death. [Direct Appeal, C. 89–90.] During the sentencing hearing, the trial court stated that new counsel would be appointed for Miller's appeal. [Direct Appeal, R. 1473–74.] Mr. William R. Hill, Jr. and Mr. J. Haran Lowe, Jr. ('appellate counsel') were subsequently appointed and filed a motion for new trial on or about August 1, 2000.

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[Direct Appeal, C. 93–94.] In addition, appellate counsel filed a 'Motion for the State of Alabama to Provide Transcript of Record.' [Direct Appeal, C. 91–92.] On August 25, 2000, appellate counsel filed an amended motion for new trial alleging various claims including a claim that Miller's due process rights were violated because of the ineffectiveness of trial counsel. [Direct Appeal, C. 7, 95–97.] On August 30, 2000, the trial court granted a joint motion to continue the hearing on Miller's motion for new trial until October 13, 2000 in order for the transcript of Miller's trial to be completed. [Direct Appeal, C. 108–10.] After the trial court granted Miller funds for expert assistance, the hearing on the motion for new trial was again continued until December 7, 2000. [Direct Appeal, C. 7, 132.]

"The trial court conducted hearings on Miller's motion for new trial on December 7, 2000 and January 31, 2001. [Direct Appeal, Motion for New Trial Hearing, R. 4–176.] During the December 7, 2000 hearing, Miller, through appellate counsel, called his trial counsel, Mickey Johnson, at the hearing and questioned him extensively regarding his preparation for and performance during his trial as well as his trial strategies. [Motion for New Trial Hearing, R. 4–110.] On January 31, 2001, Miller presented the testimony of Dr. Bob Wendorf, a clinical psychologist, to critique Dr. Scott's testimony during the penalty phase of Miller's trial. [Direct Appeal, Motion for New Trial Hearing, 111–156.] Miller also called Aaron McCall from the Alabama Prison Program to discuss the role and availability of mitigation expert assistance. [Direct Appeal, Motion for New Trial Hearing, R. 157–175.] After the hearing, Miller filed a brief in support of motion for new trial and provided arguments in support of his claims of ineffective assistance of counsel. [Direct Appeal, C. 114–25.]

On February 21, 2001, the trial court denied Miller's motion for new trial. [Direct Appeal, C. 132.] Miller subsequently filed a brief on appeal in the Alabama Court of Criminal Appeals, in which he raised a number of ineffective assistance of trial counsel claims. On remand from the Court of Criminal Appeals, the trial court entered a written order providing specific findings of fact regarding the claims raised in Miller's motion for new trial.[2] In that order, the trial court addressed Miller's ineffective assistance of trial counsel claims at length: 1) that trial counsel admitted Miller's guilt during the guilt phase opening statements, 2) that trial counsel failed to present an insanity defense during the guilt phase, 3) that trial counsel failed to move for a change of venue, 4) that trial counsel failed to present a defense during the guilt phase of trial, 5) that trial counsel undermined the mitigation case during the penalty phase ***365** opening statement, 6) that trial counsel failed to object to victim impact testimony during the penalty phase, 7) that trial counsel failed to adequately investigate and present a penalty phase defense, and 8) that trial counsel failed to challenge the constitutionality of the heinous, atrocious, and cruel aggravating circumstance.

"In reviewing those claims, the trial court found all of Miller's claims of ineffective assistance of trial counsel to be without merit.... Thus, the trial court thoroughly reviewed and considered the evidence that was presented at the hearing on Miller's motion for new trial. Based both on the trial court's review of that evidence and personal knowledge of what transpired during his trial, the trial court rejected Miller's ineffective assistance of trial counsel claims and denied relief.

> "On return from remand, the Court of Criminal Appeals affirmed Miller's capital murder conviction and death sentence. *Miller v. State,* 913 So.2d 1148 (Ala.Crim.App.2004). In its decision, that Court thoroughly reviewed and rejected his ineffective-assistance-of-trial-counsel claims. *Miller,* 913 So.2d at 1161–63.
>
> "As shown above, Miller, through appellate counsel, moved this Court to continue the hearing on his motion for new trial until the trial transcript was completed to allow for a full review of his ineffective assistance of trial counsel claims. [Direct Appeal, C. 108–09.] Given that the trial court appointed appellate counsel to represent Miller on or about August 1, 2000 and the hearing on Miller's motion for new trial were not held until December 7, 2000 and January 31, 2001, nearly *six months* passed between the trial court's appointment of appellate counsel and the completion of the hearing on Miller's motion for new trial. As appellate counsel Hill testified during the Rule 32 hearing, this lengthy period of time was utilized to study the transcript of Miller's trial, review trial counsel's files, conduct legal research, discuss strategy with appellate counsel Lowe, interview Miller, talk with Miller's mother and otherwise prepare to litigate Miller's ineffective-assistance of-trial-counsel claims. [August 2008 Rule 32 Hearing, R. 13, 60–62.]
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> "Thus, Miller's newly appointed appellate counsel had a copy of his trial transcript,[3] engaged in an in depth

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investigation of his ineffective assistance of trial counsel claims, and fully litigated those claims at the hearing on his motion for new trial."

(C. 1959–67.) (Emphasis in original.)

[8] The circuit court's findings of fact and conclusions of law are supported by the record. However, we need not determine whether appellate counsel's performance was deficient because even if we were to assume for the sake of argument that Miller's appellate counsel should not have asserted claims of ineffective assistance of trial counsel in the motion for a new trial without having sufficient time to prepare a comprehensive case to support those claims, Miller is still due no relief because, as discussed throughout the remainder of this opinion, Miller has failed to establish the requisite prejudice.

"A defendant claiming ineffective assistance of counsel in violation of the Sixth Amendment must demonstrate that: (1) counsel's performance was deficient, and (2) the deficient performance ***366** prejudiced the outcome of the proceedings. See *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064. 'Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.' *Id.* ...

"Because the failure to demonstrate either deficient performance or prejudice is dispositive of the claim against the petitioner, 'there is no reason for a court deciding an ineffective assistance claim to ... address both components of the inquiry if the defendant makes an insufficient showing on one.' *Strickland,* 466 U.S. at 697, 104 S.Ct. at 2069. Accordingly, we may consider whether the petitioner suffered prejudice as a result of counsel's alleged errors without first evaluating the adequacy of counsel's performance. See *id.;* see also *McClain v. Hall,* 552 F.3d 1245, 1251 (11th Cir.2008) ('We may decline to decide whether the performance of counsel was deficient if we are convinced that [the petitioner] was not prejudiced'). In fact, the Supreme Court has made clear that '[t]he object of an ineffectiveness claim is not to grade counsel's performance' and therefore, '[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.' *Strickland,* 466 U.S. at 697, 104 S.Ct. at 2069."

Windom v. Secretary, Dep't of Corr., 578 F.3d 1227, 1248 (11th Cir.2009), cert. denied, *Windom v. McNeil,* —— U.S. ——, 130 S.Ct. 2367, 176 L.Ed.2d 566 (2010).

B.

[9] In the second part of his argument, Miller contends that having made the decision to present ineffective-assistance-of-trial-counsel claims in the motion for a new trial, appellate counsel had an obligation to thoroughly investigate those claims, which, he claims, appellate counsel failed to do. (Miller's brief, II(B)(1), at 28–33; Miller's reply brief, at 11–15.)

Specifically, Miller alleges that his appellate counsel's investigation of trial counsel's representation was deficient because, he claims: (1) appellate counsel did not speak with trial counsel or review the court file or trial counsel's files, nor did appellate counsel speak to any trial witnesses or members of Miller's family in preparation for the motion for a new trial; (2) appellate counsel met with Miller only twice before the hearing on the motion for a new trial; (3) appellate counsel did not spend adequate time preparing for the hearing on the motion for a new trial; (4) appellate counsel did not interview or speak with Miller's family, friends, or coworkers before the hearing and therefore counsel did not learn of possible mitigating evidence that could have been, but was not, presented at trial; (5) appellate counsel failed to interview Dr. Scott, who testified as the mitigation witness, and therefore appellate counsel did not learn of trial counsel's alleged incompetence in dealing with Dr. Scott; (6) appellate counsel were ineffective in failing to gather and evaluate documents that had not been gathered by trial counsel, including Miller's medical records, educational records, employment records, Department of Human Resources records, Miller family mental-health and criminal records, and files and reports of the State's psychological experts; and therefore, (7) appellate counsel did not effectively evaluate trial counsel's performance or establish prejudice based on trial counsel's inadequate performance.

Although Miller limits this portion of his argument in his brief to the adequacy of his appellate counsel's *investigation* of the claims presented in the motion-for-new-trial proceedings, in his amended Rule 32 ***367** petition he alleged that his appellate counsel's investigation *and* presentation of the claims were deficient. (C. 352–56.) As a result, the circuit

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court addressed the whole of appellate counsel's performance with regard to the post-sentencing proceedings, i.e., the court addressed appellate counsel's investigation, preparation, and the presentation of the ineffective-assistance-of-trial-counsel claims in the motion-for-new-trial proceedings and on appeal. Because the portion of the circuit court's order addressing this claim does not lend itself to piecemeal exception, we set forth the circuit court's findings as a whole with regard to the performance prong of appellate counsel's assistance in the new trial proceedings:

> "In paragraphs 280–288 [C. 352–56] of his amended petition, Miller alleges that his appellate counsel were ineffective during their investigation and preparation for his motion for a new trial and on direct appeal. Miller claims that his appellate counsel were ineffective in the following areas: 1) that his appellate counsel did nothing to independently investigate his case (Paragraphs 282–83) [C. 352–53], 2) that appellate counsel were ineffective in arguing that trial counsel was ineffective for withdrawing the insanity defense and failing to present evidence in the guilt phase to negate intent (paragraph 284) [C. 353–54], 3) that appellate counsel failed to obtain medical records for Miller and his family and failed to have Miller independently examined by a mental health expert (Paragraphs 285–86) [C. 354–55], 4) and that appellate counsel failed to raise additional claims of error during the motion for new trial such as trial counsel's allegedly ineffective performance during voir dire (Paragraphs 287) [C. 355–56.]
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> "Miller's claim is denied because he has failed to prove that his appellate counsel's performance during the motion for new trial hearing and on direct appeal was deficient and unreasonable. Miller also failed to demonstrate that appellate counsel's performance was not the product of a strategic decision.
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> "Miller's appellate counsel went to great lengths to fully investigate the issue of ineffectiveness of trial counsel during the hearing on Miller's motion for new trial. After being appointed as appellate counsel for Miller and filing a motion for new trial, appellate counsel obtained several continuances for the hearing on the motion for new trial in order for the trial transcript to be prepared. [Direct Appeal, C. 132.] Appellate counsel utilized this time to investigate, research and prepare to present several claims of ineffective assistance of trial counsel.
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> "Appellate counsel Billy Hill testified at the Rule 32 hearing that during this time before the trial transcript was completed, he met with Miller in the Shelby County jail an obtained general family background information. [August 2008 Rule 32 Hearing, R. 13, 15.] Hill also testified that he reviewed reports of trial counsel's conduct in the local newspapers and both Hill and appellate counsel Haran Lowe testified that they interviewed and discussed the trial with Barbara Miller, Alan's mother. [August 2008 Rule 32 Hearing, R. 22, 30, 84.] During the interview with Ms. Miller, appellate counsel was alerted to the possible history of mental illness in Miller's family. [August 2008 Rule 32 Hearing, R. 30–31.] As a result, appellate counsel attempted to obtain access to the mental health records of Miller's grandfather and father from Bryce Hospital but was unsuccessful. [August 2008 Rule 32 Hearing, R. 34, 86.]
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> "Hill and Lowe received the trial transcript on November 2, 2000, studied the ***368** transcript and identified potential errors and defects in trial counsel's performance. [August 2008 Rule 32 Hearing, R. 23, 84–85.] After examining the transcript, appellate counsel conducted legal research, reviewed Dr. Scott's report of his evaluation of Miller, acquired and reviewed [lead] trial counsel Johnson's entire case file, and gathered newspaper articles about Miller's trial that were written in the Shelby County area. [August 2008 Rule 32 Hearing, R. 60.] Finally, Hill testified that they interviewed Johnson in preparation for the hearing on the motion for new trial. [August 2008 Rule 32 Hearing, R. 36.]
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> "Based on this investigation and after spending a great deal of time thinking about Miller's case, Hill testified that he identified several major concerns regarding trial counsel's performance. [August 2008 Rule 32 Hearing, R. 41–43, 58.] Specifically, Hill stated that he was concerned about trial counsel Johnson's failure to present a mental capacity argument during the guilt phase, that Johnson dropped the insanity defense, that Johnson had a 'defeatist attitude' and that there was significant pre-trial publicity. [August 2008 Rule 32 Hearing, R. 41–42.] Accordingly, Hill testified that he focused on preparing to present those claims that would provide the strongest argument for relief during the hearing on the motion for new trial. [August 2008 Rule 32 Hearing, R. 63.]
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> "To address the specific concerns regarding trial counsel's performance, Hill called Johnson to testify during the

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December 7, 2000, hearing. [Direct Appeal, Motion for New Trial Hearing, R. 4–110.] During the evidentiary hearing, Hill stated his strategic purpose for calling Johnson [was]: 1) to emphasize statements made by Johnson before trial that were prejudicial, 2) to show that essentially no mitigation testimony was presented, and 3) that trial counsel did not present mental health evidence during the case in chief. [August 2008 Rule 32 Hearing, R. 43.]

"A review of appellate counsel's questioning of Johnson during the December 7, 2000 motion for new trial hearing demonstrates that Hill thoroughly examined Johnson on those issues. The focal point of Hill's examination of Johnson centered on Johnson's strategy during the guilt phase of Miller's trial. [Motion for New Trial Hearing, R. 14–17, 29–37.] Hill specifically asked Johnson whether he actually had a theory of defense to the charge of capital murder. [Motion for New Trial Hearing, R. 14.] After Johnson stated that the evidence of guilt was too overwhelming, Hill then probed Johnson on why he did not have Dr. Scott 'make an examination as to whether or not his delusional diagnosis could have impacted his ability to form a specific intent' so that a manslaughter defense could have been argued during the guilt phase. [Motion for New Trial Hearing, R. 16.] Hill then elicited testimony from Johnson that he did not use the readily available evidence in Dr. Scott's report that Miller was in a delusional state, made no attempts to shoot witnesses, made no attempt to cover up the crime, and that Miller did not understand what was going on to argue during the guilt phase that Miller could not form specific intent necessary to sustain a conviction for capital murder. [Motion for New Trial Hearing, R. 28–29, 36–37.] Finally, in response to Hill's questioning, Johnson agreed that he had 'conceded the guilt phase of this case.' [Motion for New Trial Hearing, R. 35.]

"Next, Hill introduced reports from a number of newspapers, including the Birmingham News, which preceded Miller's trial. [Motion for New Trial Hearing, ***369** R. 50.] Hill then questioned Johnson on why he was not concerned that comments Johnson made in the Birmingham News regarding the withdrawal of the insanity plea could have been prejudicial. [Motion for New Trial Hearing, R. 52.] Hill then asked Johnson whether he was aware of the extensive coverage of Miller's case and why Johnson did not move for a change of venue. [Motion for New Trial Hearing, R. 54.]

"Finally, Hill questioned Johnson regarding his trial strategy during the penalty phase, Johnson's investigation of mitigating evidence and the presentation of mitigation evidence during the penalty phase. [Motion for New Trial Hearing, R. 17–25, 65–70.] Johnson testified that his strategy during the penalty phase involved presenting the testimony of Dr. Scott to demonstrate that Miller suffered from a diminished capacity. [Motion for New Trial Hearing, R. 17–18.] Hill then repeatedly questioned Johnson on the reasons he did not present additional mitigating evidence such as testimony concerning Miller's bad relationship with his father, the testimony of Miller's family members, specifically his mother, Barbara Miller, concerning Miller's background and evidence of Miller's grandfather's psychiatric issues. [Motion for New Trial Hearing, R. 20–24, 65–68.]

"In a further attempt to prove the trial counsel was ineffective in the presentation of mental health evidence, appellate counsel sought and were granted funds to hire Dr. Bob Wendorf, a clinical psychologist who testified at the January 31, 2001 hearing on Miller's motion for new trial. [Direct Appeal, C. 132.] Appellate counsel Hill stated that he made a strategic decision to call Dr. Wendorf in order to show that based on the information available in Dr. Scott's report, there were additional psychological diagnoses that could have pertained to Miller that were not pursued by trial counsel. [August 2008 Rule 32 Hearing, R. 44, 70.] Specifically, based on the information contained in Dr. Scott's report that Miller described himself as being in a dream state during the shootings, Dr. Wendorf testified that such actions were consistent with symptoms of a dissociative disorder such as post-traumatic stress disorder or multiple personality disorder. [Motion for New Trial Hearing, R. 144–46.] Hill then elicited from Dr. Wendorf that the effects of such disorders could have had an impact on the ability to form intent. [Motion for New Trial Hearing, R. 147.]

"Finally, in an effort to prove that trial counsel had not presented adequate mitigation evidence during the penalty phase, appellate counsel called Aaron McCall, an employee of the Alabama Prison Project to testify during the January 31, 2001 hearing. [Motion for New Trial Hearing, R. 157–175.] Hill testified during the evidentiary hearing that the strategic purpose for calling McCall was to prove that a qualified mitigation expert witness was available to conduct a full mitigation investigation of Miller's life. [August 2008 Rule 32 Hearing, R. 49.] In fact, in an effort

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to demonstrate that mitigation experts were available at the time of Miller's trial, appellate counsel Lowe introduced a letter sent by McCall to trial counsel Johnson in August of 1999 in which the Alabama Prison Project offered services and assistance in providing mitigating evidence for the trial. [Motion for New Trial Hearing, R. 158–60.]

"The evidence presented during the Rule 32 evidentiary hearing demonstrates that both appellate counsel vigorously investigated Miller's case in ***370** preparation for presenting a case of ineffective assistance of counsel and adequately presented such claims during the December 7, 2000 and January 31 2001 hearings on Miller's motion for new trial. Miller has not met the burden of demonstrating that his appellate counsel's performance was deficient under the first *Strickland* prong. Miller has failed to establish that appellate counsel's performance was so unreasonable that no competent counsel would have investigated and presented claims of ineffective assistance of trial counsel during the motion for new trial hearing and on direct appeal in the manner in which appellate counsel Hill and Lowe presented Miller's case. *See Grayson v. Thompson,* 257 F.3d 1194, 1216 (11th Cir.2001).

"Contrary to Miller's claims in paragraph 282 of his amended petition that appellate counsel did not interview family members, Hill and Lowe specifically stated that they interviewed Barbara Miller in preparation for the hearing on the motion for new trial. [August 2008 Rule 32 Hearing, R. 30, 84.] Contrary to Miller's claims that appellate counsel did not obtain any documents pertaining to Miller's life and background, both of his appellate counsel testified that they unsuccessfully attempted to obtain Miller's family psychiatric records. [August 2008 Rule 32 Hearing, R. 34, 86.] Simply because appellate counsel were unsuccessful in obtaining these records does not demonstrate deficient performance. Furthermore, even if the mental health records of Miller's family members were obtained, Miller has failed to establish that a competent attorney would have introduced such records. Both Hill and Lowe testified that in their extensive experience defending capital murder cases, neither had introduced the psychiatric or medical records of a defendant's extended family. [August 2008 Rule 32 Hearing, R. 69, 103.]

"Furthermore, although Hill testified that he did not interview other family members or accumulate other documents, Miller failed to present any evidence during the evidentiary hearing as to why appellate counsel did not conduct further interviews or obtain more of Miller's records. Miller failed to question appellate counsel on the strategic reasons for how appellate counsel conducted their investigation in this regard. There is a strong presumption that counsel's performance was within the 'wide range of reasonable professional assistance.' *Grayson v. Thompson,* 257 F.3d 1194, 1216 (11th Cir.2001). 'An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption [because] where the record is incomplete or unclear about [counsel's] actions, [the court] will presume that he did what he should have done, and that he exercised reasonable professional judgment.' *Chandler v. United States,* 218 F.3d 1305, 1315, n. 15 (11th Cir.2000). Because the record is silent as to why appellate counsel did not interview more of Miller's family members and obtain additional educational, mental, or employment records, this Court must presume that appellate counsel acted reasonably in representing Miller. For that reason, Miller's claims should be denied.

"Although Miller claims that appellate counsel ineffectively argued that trial counsel failed to present mental health evidence during the guilt phase that would have negated the intent for capital murder, Hill specifically questioned Johnson on his failure to present evidence of Miller's mental condition during the guilt phase. [August 2008 Rule 32 Hearing, R. 64.] Hill testified that ***371** he and Lowe made a strategic decision to challenge trial counsel's performance in this regard during the guilt phase. [August 2008 Rule 32 Hearing, R. 66.] Hill's strategy involved demonstrating that there was evidence within Dr. Scott's report that suggested Miller did not appreciate the nature and quality of his acts, that this evidence would be significant in mounting a defense to capital murder charges, and that this evidence was not presented during the guilt phase. [August 2008 Rule 32 Hearing, R. 64–64.] Appellate counsel's strategic choices after conducting extensive legal research and review of the trial transcript and Dr. Scott's report should not be found to be deficient. *See Boyd v. State,* 746 So.2d 364, 375 (Ala.Crim.App.1999) ('Strategic choices made after a thorough investigation of relevant law and facts are virtually unchallengeable.') The ultimate result that appellate counsel's strategy to attempt to demonstrate ineffective assistance of trial counsel was unsuccessful does not prove deficient performance of appellate counsel. *See Davis v. State,* [9 So.3d 539, 550 (Ala.Crim.App.2008)] (' "The fact that a particular defense was unsuccessful does not prove ineffective assistance of counsel." ')

(quoting *Chandler v. United States,* 218 F.3d 1305, 1314 (11th Cir.2000)).

"Finally, Miller has not proved that appellate counsel were deficient under *Strickland* for failing to present additional claims of ineffective assistance of trial counsel during the motion for new trial hearing that have been raised by current post-conviction counsel. [C. 355–56.] To constitute effective assistance, 'an attorney is not required to raise every conceivable constitutional claim available at trial and on appeal.' *Boyd,* 746 So.2d at 376. Moreover, Hill testified during the evidentiary hearing that he had strategic reasons for presenting specific issues of ineffective assistance of trial counsel; Hill testified that he focused on presenting the strongest claims during the motion for new trial hearing. [August 2008 Rule 32 Hearing, R. 63.] Hill testified that he made strategic decisions to focus on trial counsel's failure to present evidence during the guilt phase, trial counsel's failure to move for change of venue, and trial counsel's failure to effectively challenge the aggravating circumstance presented during the penalty phase. [August 2008 Rule 32 Hearing, R. 66–67.] Miller has failed to establish that no competent counsel would have pursued such strategies.

"For these reasons mentioned above, Miller has failed to meet his burden of proof of establishing that his appellate counsel's performance was deficient under *Strickland;* therefore Miller's ineffective assistance of appellate claims are without merit. Accordingly, these claims are denied."

(C. 1977–1989.)

The circuit court's finding that Miller failed to prove that his appellate counsel's performance was deficient is supported by the record. In any event, the circuit court also denied Miller relief on this claim because Miller failed to establish that he was prejudiced by his appellate counsel's performance, which bring us to the third part of Miller's argument.

C.

In the third portion of his argument, Miller claims that had appellate counsel adequately argued and supported the claims of ineffective assistance of trial counsel that were addressed in the motion for new trial proceedings and on appeal, he would have been entitled to relief. (Miller's ***372** brief, II(B)(2)(a)-(d) at 33–124; Miller's reply brief at 15–39.)

Before addressing Miller's specific allegations, we set forth a summary of the evidence that was presented during the hearing on the motion for a new trial:

"At the hearing on Miller's motion for a new trial, Mickey Johnson, Miller's [lead] trial counsel, testified. Johnson stated that when he was appointed to represent Miller on the day of the shootings, he had been practicing law for 25 years. He met with Miller shortly after Miller was apprehended and again later that night. That same day, Johnson also met with several Pelham police officers and with Miller's mother.

"Johnson had litigated five or six capital-murder cases before he was appointed to represent Miller. Roger Bass was initially appointed cocounsel; however, when Bass withdrew, Ronnie Blackwood was appointed to serve as cocounsel.

"Johnson met with Miller on a number of occasions before trial. Before forming a strategy for Miller's case, Johnson reviewed all of the investigative reports, diagrams, statements, photographs, videotapes, and scientific reports; he also talked with his client. Johnson filed a motion requesting funds for an independent psychological evaluation of Miller. The trial court granted his motion, and Johnson retained Dr. Charles Scott from the University of California to evaluate Miller. After talking with Dr. Scott and reviewing Dr. Scott's written report, Johnson determined that there was insufficient evidence to raise an insanity defense during the guilt phase. In his opinion, it was better to present Dr. Scott's testimony during the penalty phase because presenting his testimony at the guilt phase would have negated Dr. Scott's credibility and lessened the potential impact of the evidence during the penalty phase. Johnson made this decision after reviewing the reports from other mental-health evaluations of Miller, which were consistent with Dr. Scott's findings.

"After reviewing the evidence, Johnson made a strategic decision to concentrate his efforts and defense on the penalty phase of the trial. In his opinion, the State's evidence of Miller's guilt 'was too overwhelming to seriously contest,' given that he had no valid legal defense for the guilt phase. Accordingly, Johnson decided to concentrate on saving Miller's life.

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"Johnson focused his efforts during the guilt phase on maintaining credibility with the jury. In accordance with this strategy, he admitted to the jury early on in the proceedings that the evidence of Miller's guilt was strong because he wanted to lessen the impact of the evidence against Miller. Johnson felt that his duty during the guilt phase was to make the State meet its burden of proof.

"During the penalty phase, Johnson presented a diminished-capacity defense. Through Dr. Scott's testimony, he presented two mitigating circumstances. He also argued the undisputed mitigating circumstance of no prior criminal history. During the penalty phase, Johnson argued that the State had failed to prove any aggravating circumstances. He also wanted to point out to the jury that the mitigating circumstances were undisputed. Johnson hoped that the jury was looking for a reason not to recommend the death penalty, and that his arguments would give the jury a sound legal basis for recommending a sentence of life imprisonment without the possibility of parole.

***373** "Before the penalty phase, Johnson talked with Miller's parents and other family members. He considered calling them as witnesses. However, after talking with Miller's family, he determined that it was best to present Miller's social and family history through Dr. Scott's testimony. In Johnson's opinion, Dr. Scott was a credible witness. Johnson also believed that the support Miller had from his family members during trial was affecting the jury in a positive way. Johnson believed that the jurors sympathized with Miller's family and he did not want to detract from this sympathy by putting family members on the stand.

"Miller presented testimony from two other witnesses in support of his motion for a new trial. Dr. Bob Wendorf, a clinical psychologist, testified that based on his review of Dr. Scott's report, he believed there were other possible mitigating factors Johnson could have presented. Miller also elicited testimony from Aaron McCall with the Alabama Prison Project. McCall indicated that he had sent Johnson a letter in August 1999, offering his services in Miller's case. However, McCall testified, Johnson never responded to his letter."

Miller, 913 So.2d at 1159–60.

Miller maintains that his appellate counsel failed to properly present and support the following claims in the motion for a new trial: (1) that trial counsel were ineffective for not presenting a mental disease-or-defect defense during the guilt phase of the trial; (2) that trial counsel's opening statement at the guilt phase of the trial prejudiced Miller; (3) that trial counsel were ineffective in failing to adequately investigate and present available mitigating evidence during the penalty phase of the trial; and (4) that trial counsel's penalty-phase opening statement prejudiced Miller.

In order to establish that his appellate counsel were ineffective in the manner in which they presented the claims of ineffective assistance of trial counsel in the new-trial proceedings and on appeal, Miller had to first establish that his underlying claims of ineffective assistance of trial counsel had merit. See *Payne v. State,* 791 So.2d 383, 401 (Ala.Crim.App.1999), cert. denied, 791 So.2d 408 (Ala.2000) ("Because Payne has failed to establish that his ineffective-assistance-of-trial-counsel claim is meritorious, he has failed to prove by a preponderance of the evidence that his appellate counsel was ineffective for failing to present this claim."). Therefore, even though Miller's claims of ineffective assistance of trial counsel were precluded, Miller reasserted many of those claims in support of his argument that had his appellate counsel sufficiently presented and supported those claims in the new-trial proceedings and on appeal, he would have been entitled to relief. In fact, a majority of the circuit court's order denying Miller's Rule 32 petition is addressed to the underlying claims of ineffective assistance of trial counsel. See *Covington v. State,* 671 So.2d 109, 110 (Ala.Crim.App.1995) (holding that even though a claim of ineffective assistance of trial counsel is barred, the claim must be examined in order to assess appellate counsel's performance). Thus, we turn to Miller's specific claims regarding his trial counsel.

1.

Miller contends that his trial counsel were ineffective for "withdrawing the insanity defense and then failing to present available mental health evidence during the trial's guilt phase." (Miller's brief, II(B)(2)(a), at 33–68; Miller's reply brief, at 15–23.) As addressed above, appellate counsel asserted in the hearing on the motion for a new trial that Miller's trial counsel were ineffective for withdrawing ***374** his plea of not guilty by reason mental disease or defect. The circuit court denied Miller relief on this claim. On direct appeal, this Court also rejected Miller's claim that his trial counsel were ineffective for withdrawing his mental-disease-

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or-defect plea because we found that Miller's trial counsel's decision was "made after a thorough investigation of the relevant law and facts of Miller's case." *Miller,* 913 So.2d at 1161.

Trial counsel's decision to withdraw the plea of not guilty by reason of mental disease or defect was made after his mental-health experts Dr. Scott and Dr. Barbara McDermott, the psychologist Dr. Scott engaged to assist him, determined that Miller did not meet Alabama's legal definition of "insanity" at the time the crimes were committed. Miller argues that Dr. Scott's and Dr. McDermott's evaluations were incomplete because, he claims, trial counsel failed to provide them with sufficient factual and legal information with which to conduct their evaluations. Thus, he contends, trial counsel's decision to withdraw the not-guilty-by-reason-of-mental-defect plea was unreasonable because it was based upon incomplete evaluations. He argues that had appellate counsel adequately argued and supported this claim in the motion-for-new-trial proceedings and on appeal, he would have been entitled to relief.

When denying relief on this claim, the circuit court stated:

> "In paragraphs 138–147 of his amended petition, Miller claims that his trial counsels' decision to withdraw the insanity defense was unreasonable. Miller alleges that trial counsels' reliance on Dr. Scott and Dr. McDermott's evaluations in deciding to withdraw the not guilty by reason of insanity plea was ineffective because he claims trial counsel did not provide Dr. Scott with adequate background information to support the evaluation. [Amended Rule 32 Petition, C. 308.] Miller also claims that Dr. Scott's ultimate conclusion that Miller was not insane was 'equivocal' and that trial counsel should have provided additional information and documents to Dr. Scott and sought additional expert opinion. [Amended Rule 32 Petition, C. 310.]
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> "This Court denies Miller's claim because he has failed to meet his burden of proof of demonstrating that his trial counsel's performance was deficient under *Strickland,* 466 U.S. at 688, Ala. R.Crim. P. 32.7(d). Miller's trial counsel could not be deficient for withdrawing the insanity defense because none of the psychological or psychiatric experts who evaluated Miller before trial concluded that Miller met the legal definition for insanity.
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> "Miller, through counsel, originally pled not guilty by reason of mental disease or defect. [Direct Appeal, C. 1.] To qualify under the legal definition of insanity, Miller bore the burden or demonstrating that he 'was unable to appreciate the nature and quality or wrongfulness of his acts.' Ala.Code § 13A–3–1. However, as demonstrated during trial and the [Rule 32] evidentiary hearing, none of the four mental health experts who examined Miller concluded that he was unable to appreciate the nature and quality of his actions. [Direct Appeal, R. 1384; Motion for New Trial Hearing, R. 72–74; February 2008 Rule 32 Hearing, R. 248.]
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> "Dr. James Hooper, a psychologist at the Taylor Hardin Medical Facility, first evaluated Miller and concluded in his report on October 8, 1999 that Miller 'does not have a mental illness that would have compromised his understanding of the nature, quality, or ***375** wrongfulness of his behavior.' [Miller's Rule 32 Exhibit, 29–0211.] Dr. Harry McClaren, a psychologist hired by the State of Alabama, also evaluated Miller to determine whether Miller qualified under Alabama's insanity statute. On December 2, 1999, Dr. McClaren ultimately concluded that Miller did not meet the legal definition of insanity and that there was no evidence that he was unable to appreciate the nature and quality of his actions. [Miller's Rule 32 Exhibit, 27–0033.]
>
> "Finally, as noted above, trial counsel retained Dr. Charles Scott, a psychiatrist, for the purpose of determining whether Miller was legally insane at the time of the shootings. Dr. Scott engaged in an extensive evaluation of Miller including a three-day assessment of Miller himself, interviews of family members, and the examination of numerous documents and reports. [Direct Appeal, R. 1345–48.] Dr. Scott also retained Dr. Barbara McDermott to administer various psychological tests to Miller. [February 2008 Rule 32 Hearing, R. 316] However, after concluding this investigation, Dr. Scott stated in his report that in his opinion, Miller was not unable to appreciate the nature and quality of his actions or the wrongfulness of his conduct. [Miller's Rule 32 Exhibit, 29–0022; Direct Appeal, R. 1384, February Rule 32 Hearing, R. 251.]
>
> "Thus, trial counsel could not have provided any expert opinion testimony to credibly argue to the jury that Miller was legally insane. Any argument that Miller was legally insane could have been effectively rebutted from Miller's own expert's conclusion that he was not insane. [Direct Appeal, R. 1384.] Johnson testified that he was aware of each of these reports and that neither Dr. Hooper's, nor Dr. McClaren's, nor Dr. Scott's reports conflicted on the

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issue of Miller's sanity at the time of the offense. [Motion for New Trial Hearing, R. 73–74; February 2008 Rule 32 Hearing, R. 251.] Johnson testified that after receiving Dr. Scott's report, he discussed the findings with Dr. Scott and ultimately decided to withdraw the insanity defense on May 24, 2000 [February 2008 Rule 32 Hearing, R. 91–92.] Johnson stated during the [Rule 32] evidentiary hearing that if any of the four doctors who evaluated Miller had declared that Miller was insane at the time of the offense, such a finding would have altered his strategy and that he would have used that opinion as part of his defense. [February 2008 Rule 32 Hearing, R. 248.]

"Trial counsel's decision to withdraw the insanity plea was not an unreasonable decision. The withdrawal of the insanity defense was the product of a strategic decision made after both consultation with a mental health expert hired for the express purpose of evaluating Miller's sanity and consideration of additional investigation and expert opinions. Based on the unequivocal conclusions of all four examining doctors that Miller was not unable to appreciate the wrongfulness of his actions at the time of the offense, trial counsel's decision to withdraw the not guilty by reason of insanity plea was not deficient and entirely reasonable based on the information and evidence available to trial counsel. Therefore, this claim should be denied.

"This claim is also denied because Miller has failed to meet his burden of proof demonstrating that he was prejudiced by his trial counsel's performance. *See* *Strickland,* 466 U.S. at 695, Ala. R.Crim. P. 32.7(d). Miller was not prejudiced by his trial counsel's withdrawal ***376** of the insanity plea because no evidence has been presented during the evidentiary hearing that Miller could not appreciate the wrongfulness of his actions and therefore would have been eligible for a not guilty by reason of mental defect or insanity plea.

"Although Miller now claims that his trial counsel should have presented more information to Dr. Scott or obtained additional expert opinion regarding Miller's sanity, the record indicates that even if such additional measures were taken, the result would be the same: that Miller does not meet the requirements for insanity under Alabama law. At the evidentiary hearing, Dr. [Catherine] Boyer [Miller's Rule 32 psychologist] testified that in her opinion, Miller experienced a dissociative episode at the time of the shootings and that this opinion would be important as a mental health professional in determining whether Miller was sane or insane at the time of the shootings. [February 2008 Rule 32 Hearing, R. 719–20.]

"However, incredibly, Dr. Boyer never testified that in her opinion, Miller was legally insane at the time of the shootings. When pressed on this crucial question by counsel for the State, Dr. Boyer stated 'I really don't know if I can answer it.' [February 2008 Rule 32 Hearing, R. 757.]) Most importantly, Dr. Boyer testified that after her complete investigation, if she had been called to testify as to Miller's sanity at the time of trial, she would have had no opinion. [February 2008 Rule 32 Hearing, R. 758.] Therefore, Miller has failed to present any evidence that a mental health expert would have been available to testify at trial that Miller was insane at the time of the shootings.

Miller also failed to present any evidence during the evidentiary hearing that conflicts with the evidence and expert opinion regarding Miller's sanity at the time of trial. Dr. Scott never testified that his opinion at the time of trial that Miller was not unable to appreciate the nature and quality or wrongfulness of his actions had changed. Although Dr. Scott stated that it was 'possible' that had he obtained additional information and conducted additional testing relating to a dissociated disorder his diagnosis could have changed, he failed to testify that such information did in fact change his opinion. [February 2008 Rule 32 Hearing, R. 364.] Like Dr. Boyer, Dr. Scott never testified that in his opinion, Miller met the requirements for insanity under Alabama law.

"Equally as important in determining that Miller was not prejudiced by the withdrawal of the insanity plea was the testimony of Dr. McClaren during the [Rule 32] evidentiary hearing. Before trial in the fall of 1999, Dr. McClaren was hired to conduct a forensic psychological evaluation of Miller. [February 2008 Rule 32 Hearing, R. 773.] After conducting his evaluation, Dr. McClaren concluded that Miller was a 'non psychotic man of average intelligence.' [February 2008 Rule 32 Hearing, R. 778.] Dr. McClaren also concluded that Miller was not insane under Alabama law at the time of the offense. [February 2008 Rule 32 Hearing, R. 780.]

After becoming involved in the case again for purposes of this Rule 32 proceeding, Dr. McClaren testified that he reviewed additional testimony, the reports of Dr. Scott and Dr. McDermott, additional psychological testing, school records as well as the testimony during the evidentiary hearing. [February 2008 Rule 32 Hearing, R. 783–84.] Dr.

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> McClaren then testified that after his review of this new information, nothing had changed his opinion that Miller was ***377** not legally insane at the time of the shootings. [February 2008 Rule 32 Hearing, R. 792–93.]
>
> "The testimony of all three mental health experts during the evidentiary hearing as well as the evidence contained in the mental health reports issued during the trial and the trial record itself are consistent: all indicate that Miller was not unable to appreciate the nature and quality or wrongfulness of his actions. No testimony has even been presented during trial or in this Rule 32 proceeding that Miller was insane at the time of the shootings under Alabama law. Therefore, Miller has failed to demonstrate a reasonable probability that the outcome of his proceeding would have been different had trial counsel not withdrawn the insanity plea because the record resoundingly evidences that Miller was in fact not insane at the time of the shootings. Accordingly, because Miller has failed to demonstrate prejudice under *Strickland,* this claim is denied."

(C. 2029–2037.)

The record supports the circuit court's conclusion that trial counsel made a strategic decision to withdraw the plea of not guilty by reason of mental disease or defect after consulting with a psychiatrist who evaluated Miller for the express purpose of determining whether Miller suffered from a mental disease or defect at the time of the shootings and after also considering the results of evaluations by three other mental-health experts, each of whom concluded that Miller did not meet Alabama's definition of "insanity" at the time of the shootings. "This is precisely the type of strategic choice, based on counsel's examination of the relevant facts and legal principles, that our cases have deemed to be virtually unchallengeable." *Key v. State,* 891 So.2d 353, 376 (Ala.Crim.App.2002). As the circuit court in *Key* aptly noted:

> " '[T]he day a lawyer is supposed to come in here and make motions and enter pleas for which he or she has no basis and in fact their education, training, experience, and their life's experience and their discussions with their [expert] provide them with no basis and you can say that that's incompetency [,] that's going to be a dark day in our legal system.' "

891 So.2d at 376.

a.

Within the argument that Miller's trial counsel were ineffective for withdrawing his not-guilty-by-reason-of-mental-disease-or-defect plea, Miller lists various documents and information that, he claims, his trial counsel should have furnished to Dr. Scott in order for Dr. Scott's sanity evaluation to be complete. Specifically, Miller contends that his trial counsel should have provided Dr. Scott with: (1) Miller's files from evaluation performed at the Taylor Hardin Secure Medical Facility; (2) Dr. McClaren's report and files; (3) the tape of Miller's police interrogation; (4) comprehensive information concerning the Miller's family mental-health history; and (5) comprehensive information concerning the physical trauma inflicted on Miller by his father. (Miller's brief, Issue II(B)(2)(a)(i)(A)-(E), at 38–50; Miller's reply brief, at 15–23.)

Miller's claim that his trial counsel should have provided Dr. Scott with the above-mentioned documents was presented in a different context in the amended Rule 32 petition. In his petition, Miller presented these allegations within his claim that his trial counsel were ineffective because counsel failed to investigate certain mental-health evidence. (Miller's amended Rule 32 petition, claim I(A)(1)(d), C. 295– ***378** 305.) We note this fact because that is the context in which this claim was addressed by the circuit court in its order denying relief. (C. 2009–26.)

Regardless, the gist of Miller's assertion is that his trial counsel should have done more, i.e., trial counsel should have provided more information to Dr. Scott for his consideration in assessing Miller's mental health at the time of the crimes. Accordingly, the circuit court correctly began its analysis by examining what Miller's trial counsel did do. See *Chandler v. United States,* 218 F.3d 1305, 1320 (11th Cir.2000) ("Although Petitioner's claim is that his trial counsel should have done something more, we first look at what the lawyer did in fact."). The circuit stated the following in this regard:

> "Contrary to Miller's claims, as the Court of Criminal Appeals has previously held regarding this issue on direct appeal, '[t]his is not a case where counsel failed to investigate a potential mental-health defense or neglected to interview potential defense witnesses.' *Miller v. State,* 913 So.2d 1148, 1161 (Ala.Crim.App.2004). Instead, Miller's mental health was of chief concern, initially trial

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counsel's main theory of defense and ultimately became the central focus of Miller's penalty phase strategy.

"The record demonstrates that trial counsel conducted an extensive and thorough investigation of Miller's mental health. Miller, through trial counsel, originally pleaded not guilty by reason of insanity. [Direct Appeal, C. 1.] Trial counsel Johnson was familiar with mental disease defenses based on his previous involvement in capital murder cases in which psychological issues had been raised. [February 2008 Rule 32 Hearing, R. 211.] Based on the interviews of his family, Johnson discovered Miller's family history of mental illness. [February 2008 Rule 32 Hearing, R. 252.] Johnson also was aware that Miller had difficulty early on remembering specific facts relating to the actual shootings and that Miller had been given a mental evaluation at Taylor Hardin Medical Facility. [February 2008 Rule 32 Hearing, R. 42, 44–45.]

"As a result, Johnson motioned the trial court to grant additional funds to hire psychological expert assistance. [Direct Appeal, C. 50–55.] The trial court granted the motion and Johnson retained Dr. Charles Scott to conduct psychiatric and psychological evaluations of Miller in order to determine whether an insanity defense would be justified. [February 2008 Rule 32 Hearing, R. 48.] In preparation for Dr. Scott's evaluation, Johnson forwarded over ninety three pages of materials to Dr. Scott including numerous witness statements, statements from Miller's co-workers, police incident reports, and a copy of Dr. James Hooper's evaluation of Miller at Taylor Hardin. [Direct Appeal, R. 1345; February 2008 Rule 32 Hearing, R. 63, 318.]

"In response to Dr. Scott's request to interview Miller's family members who were living with him at the time of the shootings, Johnson arranged for Dr. Scott to interview Miller's mother Barbara, and his brother Richard, and his sister, Cheryl. [February 2008 Rule 32 Hearing, R. 314–15.] Johnson also attempted to obtain the records of Miller's grandfather Hubert Miller, but was unsuccessful. [February 2008 Rule 32 Hearing, R. 252.] Dr. Scott never testified that he was not provided with any document that he specifically requested from trial counsel; Johnson confirmed this fact stating that 'I don't think that Dr. Scott asked for anything that he was not supplied.' [February 2008 Rule 32 Hearing, R. 76.]

***379** "After compiling this information, [Scott] interviewed and evaluated Miller over a three day period. [February 2008 Rule 32 Hearing, R. 314.] Dr. Scott also enlisted the services of a psychologist, Dr. Barbara McDermott, who conducted a psychological evaluation of Miller. [February 2008 Rule 32 R. 315–16.] After the evaluation was completed, Dr. Scott diagnosed Miller with having a delusional disorder and a psychiatric personality disorder; however, Dr. Scott concluded that Miller was not unable to appreciate the wrongfulness of his actions and therefore did not qualify under Alabama's legal definition for insanity. [February 2008 Rule 32 Hearing, R. 325–26, 335.]"

(C. 2009–13.)

With the above in mind, we now direct our focus to the specific information that Miller claims his trial counsel should have provided to Dr. Scott in order for Dr. Scott's sanity evaluation of Miller to be complete.

(i)

[10] Miller was evaluated by Dr. James F. Hooper at the Taylor Hardin Secure Medical Facility on October 4, 1999, for the purpose of assessing Miller's competence to stand trial and his mental state at the time of the murders. Hooper concluded that Miller was not suffering from a mental disease or defect at the time of the crimes. Although trial counsel provided Dr. Hooper's report to Dr. Scott, trial counsel did not provide Dr. Hooper's entire case file to Dr. Scott. Miller contends that his trial counsel was ineffective for not providing Dr. Hooper's entire case file to Dr. Scott because the Taylor Hardin file contained documents and notes indicating that Miller suffered from memory loss at the time of the offenses. Miller maintains that without that additional information, Dr. Scott's evaluation was incomplete. (Miller's brief, II(B)(2)(a)(i)(A), at 39–41.)

The circuit court found that Miller failed to establish that his trial counsel rendered ineffective assistance for not providing Miller's entire Taylor Hardin file to Dr. Scott. The circuit court stated:

> "Although not alleged in the petition, during the evidentiary hearing Miller questioned Dr. Scott on whether Johnson also provided Dr. Hooper's backup or underlying file as part of the documents Johnson provided

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> to Dr. Scott. [February 2008 Rule 32 Hearing, R. 320–21.] However, Miller has failed to produce any evidence that Johnson had access to or could have obtained Dr. Hooper's underlying file. Moreover, Miller has failed to produce any evidence that a reasonable attorney would have provided another expert's underlying file to an expert retained to conduct psychiatric evaluations on a defendant."

(C. 2015.)

The circuit court's findings are supported by the record.

(ii)

[11] Miller was also evaluated by Dr. Harry A. McClaren, a psychologist retained by the State of Alabama, who concluded that Miller did not did meet Alabama's definition of "insanity" at the time of the shootings. Miller argues that his trial counsel rendered ineffective assistance by not sending a copy of Dr. McClaren's written report and a copy of Dr. McClaren's file to Dr. Scott. (Miller's brief, II(B)(2)(a)(i)(B), at 41–45.)

In support of this assertion, Miller contends that Dr. McClaren's report contained critical information indicating that Miller suffered from periods of amnesia shortly before and during the shootings and that Dr. McClaren hypothesized that Miller may have suffered a period of dissociation ***380** at the time of the shootings. (Miller's brief at 42, citing Miller's Rule 32 Exhibit 27–0030 to –0031.) Miller additionally asserts that trial counsel did not apprise Dr. Scott and Dr. McDermott of Dr. McClaren's hypotheses, nor did trial counsel request that Dr. Scott and Dr. McDermott administer any tests to determine if Miller suffered from a dissociative or trauma-related disorder.

Miller further argues that his trial counsel should have furnished Dr. Scott with Dr. McClaren's file because the file contained: (1) Dr. McClaren's annotation that Miller denied any memory of the shootings; (2) Dr. McClaren's interview notes with the arresting officer who confirmed that Miller was confused at the time of the arrest; (3) Dr. McClaren's interview notes with a Shelby Chilton Mental Health Center employee who saw Miller a day after the shooting and who indicated that Miller may have been in shock when the employee saw him; and (4) the results of various tests performed by Dr. McClaren that supported the hypothesis that Miller was suffering a period of dissociation at the time of the shootings. (Miller's brief, at 44, citing Miller's Rule 32 Exhibit 27.)

In denying relief on this claim, the circuit court wrote:

> "Miller has failed to demonstrate prejudice under *Strickland* because the record indicates that the additional information he claims his trial counsel should have provided to Dr. Scott did not contain any additional information that Dr. Scott was not already made aware of during his evaluation. For instance, Miller claims that his trial counsel was ineffective for failing to provide Dr. Scott a copy of Dr. McClaren's report of his evaluation of Miller. [Amended Rule 32 petition, C. 297.] During the evidentiary hearing, Miller attempted to show [that] Dr. McClaren's report would have been significant to Dr. Scott because Dr. McClaren documented that Miller claimed amnesia during the shootings, that Dr. McClaren opined that a period of dissociation was possible after Miller reported experiencing 'tunnel vision,' and because the report noted that Miller was confused as to why he was arrested.
>
> "However, Dr. Scott was already aware that Miller claimed to have difficulty remembering the events and circumstances of the shootings. Dr. Scott testified during the penalty phase of the trial that Miller 'had difficulty recalling what happened and questioned the events had even occurred.' [Direct Appeal, R. 1378.] Dr. Scott also noted Miller's difficulty remembering the shootings in his report and reported that Miller 'wondered if it was a bad dream.' [Miller's Rule 32 Exhibit 29–0010.] Dr. Scott also was provided with the psychological report of Dr. Hooper, which stated that Miller 'has no memory of the index events.' [Miller's Rule 32 Exhibit 29–0208.]
>
> "Although Miller contends that it was significant that Dr. McClaren listed the possibility of a brief period of dissociation because of Miller's self-report of experiencing 'tunnel vision,' ultimately, Dr. McClaren did not diagnose Miller with any type of dissociative disorder. [Miller's Rule 32 Exhibit, 27–0039.] Moreover, Dr. Scott was also aware that Miller claimed to experience 'tunnel vision' and included this fact in his own report. [Miller's Rule 32 Exhibit, 29–0010.] Thus, Dr. Scott had access to the

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very same information that led Dr. McClaren to suggest the possibility of a period of dissociation.

"Finally, Dr. Scott was also aware that Miller had a confused state of mind at the time he was arrested by law ***381** enforcement officials. As Dr. Scott stated in his report,

> " '[Miller] said that the first time he realized that police were following him occurred when he heard the sirens and he felt that his "thoughts were spinning." When asked to describe this he said that he had brief thoughts of the shootings and thought that "this didn't make sense. I couldn't explain it." '

"[Miller's Rule 32 Exhibit, 29–0010.] Dr. Scott also reported that at the time he was arrested, Miller recalled being 'somewhat confused and thought that he might go home and wondered "why was I going home" ' and that after being taken to jail 'when he first woke up, he thought he might be at home but when he recognized that he was in jail he realized that the "[flashes] in my mind might be real." ' [Miller's Rule 32 Exhibit, 29–0010–11.] Because the record indicates Dr. Scott had knowledge of substantially the same information contained in Dr. McClaren's report, Miller has failed to demonstrate how the failure to provide Dr. McClaren's report impacted Dr. Scott's evaluation. Therefore, Miller cannot demonstrate a reasonable probability that the result of his proceeding would have been different."

(C. 2016–19.)

The circuit court's findings are supported by the record.

(iii)

After Miller was arrested, he was interrogated by the police. The interrogation was apparently recorded on either an audiotape or videotape.[4] Miller's trial counsel, Mickey Johnson, was quoted in the press on the day of trial as stating that "he ha[d] studied pictures and videotapes of Miller made at his arrest 'and there [was] this look of total disconnect or total indifference, one or the other.' " (Miller's brief at 45, citing Miller's Rule 32 Exhibit 35–0070.) Miller asserts that his trial counsel rendered ineffective assistance because Johnson did not provide Dr. Scott with a copy of the interrogation tape that Johnson was presumably referencing in his comments to the press, despite Dr. Scott's request that counsel send him any statements Miller made near the time of the shootings. (Miller's brief, II(B)(2)(a)(i)(C), at 45–46.) Miller contends that the tape recording could have helped Dr. Scott determine whether "Miller was actually fleeing because he appreciated he had committed wrongful acts or if he was genuinely surprised that he was being apprehended or charged as a result of his alleged actions." (Miller's brief, at 45, quoting Miller's Rule 32 Exhibit, 29–0023.)

The circuit court denied Miller relief on this assertion, stating:

> "Although not alleged in his amended petition, Miller attempted to suggest during the evidentiary hearing that trial counsel was ineffective for not submitting to Dr. Scott an audio/videotape of Miller's statement to the police. [February 2008 Rule 32 hearing, R. 78–80.] However, the audio/videotape of Miller's statement was not submitted into evidence during the evidentiary hearing. [February 2008 Rule 32 hearing, R. 529–30.] Miller also failed to present any ***382** proof of what actual evidence was contained on the audio/videotape. Therefore, because there is nothing in the record indicating what was contained in this evidence, Miller cannot establish how he was prejudiced by his trial counsel not providing the audio/videotape to Dr. Scott."

(C. 2022–23.)

Miller contends that the circuit court's conclusion that there was nothing in the record indicating what was contained on the interrogation tape is clearly erroneous. Miller bases this assertion on the fact Dr. McClaren noted in his file that in a taped interview with police, Miller said, " 'I'm being charged with something? ... I don't understand anything you're saying' while looking down at the floor without any eye contact." (Miller's reply brief, at 16 n. 2, citing Miller's Rule 32 Exhibit 27–0027.) Even assuming that Dr. McClaren is referencing the same tape that trial counsel Johnson alluded to in his statement to the press, Miller would still be due no relief

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on this claim for the reasons discussed in Part II.C.1.a(ii), supra.

(iv)

[12] Miller maintains that his trial counsel failed to adequately "investigate the multi-generational history of mental illness in the Miller family, which, if known, would have played a crucial role in Dr. Scott's evaluation [of Miller's sanity at the time of the crimes.]" (Miller's brief, Issue II(B)(2)(a)(i)(D), at 46–48.)

The circuit court stated the following in denying relief on this claim:

> "Trial counsel's investigation into Miller's mental health was reasonable and Miller has failed to meet his burden of establishing deficient performance. Contrary to Miller's claims, trial counsel attempted to obtain the mental health records of [Miller's] grandfather, Hubert Miller, but was unsuccessful. [February 2008 Rule 32 Hearing, R. 252.] Miller has not presented any evidence that trial counsel's attempts were unreasonable. Even if trial counsel had not attempted to obtain Miller's family mental health records, Miller cannot demonstrate that trial counsel's performance in this regard was deficient. Miller failed to present any evidence that Dr. Scott specifically requested such records and Miller failed to prove that a reasonable, competent attorney would have independently obtained and presented the mental health records of a defendant's extended family. Notably, the evidence indicates a reasonable attorney would not have investigated and presented such records. Miller's trial counsel, Mickey Johnson and Ronnie Blackwood, as well as his appellate counsel, Billy Hill and Haran Lowe, all testified in their numerous years of criminal experience, none had ever introduced the mental health records or medical records of a defendant's family. [February 2008 Rule 32 Hearing, R. 253, 872; August 2008 Rule 32 Hearing, R. 68–69, 103.]
>
> "....
>
> "This Court also denies this claim because Miller has failed to meet his burden of proof of establishing that he was prejudiced by his trial counsel's alleged failure to adequately investigate mental health evidence. *See, Strickland,* 466 U.S. at 687; Ala. R.Crim. P., 32.7(d). Even if Miller could have proven that his trial counsel's performance were deficient in failing to provide certain records to Dr. Scott, Miller failed to elicit any testimony from Dr. Scott that his report was incomplete or inaccurate due to a lack of necessary records or information. While Dr. Scott testified that additional information 'could' have been important in his evaluation, he failed to state how his evaluation was inadequate, ***383** specifically in regards to documenting Miller's mental health problems. [February 2008 Rule 32 hearing, R. 362–65.]
>
> "Furthermore, Miller has failed to demonstrate prejudice under *Strickland* because the record indicates that the additional information he claims his trial counsel should have provided to Dr. Scott did not contain any additional information that Dr. Scott was not already made aware of during his evaluation....
>
> "....
>
> "Dr. Scott ... had a knowledge of Miller's family history of mental illness. In his report, Dr. Scott devoted a section to Miller's 'Family Psychiatric History' and discussed that Ivan Miller [Miller's father] exhibited unusual behavior, that Miller's grandfather, Hubert Miller, had been committed to a psychiatric institution, and that his brother Richard was described as 'slow.' [Miller's Rule 32 Exhibit, 29–0006]. This information was then presented to the jury during Dr. Scott's penalty phase testimony. [Direct Appeal, R. 1362–63.] During the evidentiary hearing, Dr. Scott testified that a family history of psychotic disorders could impact the vulnerability and likelihood that an individual would have a mental disorder. [February 2008 Rule 32 Hearing, R. 307.] Therefore, because he was aware that Miller's family had a history of psychiatric problems, Dr. Scott had readily available information suggesting Miller would be more vulnerable to having a mental disorder.
>
> "Although Miller now claims that his trial counsel should have also provided the mental health records of his great-grandmother Victoria Granade, his father, Ivan Miller, and his uncle James Miller, Miller has failed to present any evidence that these individuals were diagnosed or how such undiagnosed mental illnesses could have impacted Miller's diagnosis. Similarly, although Miller claims the records of his grandfather Hubert Miller, which report a diagnosis of paranoid schizophrenia, and the records of his uncle Perry Miller, which report a diagnosis of bipolar disorder, should have been provided to Dr. Scott, he failed to specifically present evidence regarding how

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these precise diagnoses specifically impacted Dr. Boyer's [Miller's Rule 32 psychologist] diagnosis of post-traumatic stress disorder. [February 2008 Rule 32 hearing, R. 644–48.] Nor did Miller demonstrate how the absence of these specific records specifically distorted or affected Dr. Scott's evaluation. Therefore, because trial counsel did provide information to Dr. Scott to inform him of Miller's family history of mental illness and because Miller has failed to establish specific psychiatric diagnoses in his family's mental records that would have changed Dr. Scott's evaluation, Miller has failed to demonstrate that he was prejudiced by the failure to provide family mental health records to Dr. Scott."

(C. 2014–21.)

The circuit court's findings are supported by the record. In his brief, Miller suggests that, contrary to the circuit court's finding that there was no evidence regarding how the absence of the records impacted Dr. Scott's conclusion, Dr. Scott did testify that the missing Miller family health records would have played a "huge" role in assessing Miller's sanity. (Miller's brief, at 46–47.) However, an examination of the portion of the record referenced by Miller indicates that Dr. Scott was testifying about the role familial mental health plays in regard to building a mitigation case, not in assessing Miller's sanity at the time of the crimes.

***384** (v)

[13] Miller maintains that his trial counsel were ineffective because they did not provide Dr. Scott with "comprehensive information concerning the trauma [he] suffered from his father." (Miller's brief, II(B)(2)(a)(i)(E), at 49–50.) Thus, Miller contends, Dr. Scott's sanity evaluation was incomplete because Dr. Scott was not provided with this "crucial information." (Miller's brief, at 50.)

In denying relief on this claim, the circuit court stated:

"Miller was also not prejudiced by his trial counsel's provision of information to Dr. Scott regarding the extent and nature of physical abuse that Miller suffered as a child. Dr. Scott was informed and had knowledge that Ivan Miller physically abused Miller. Dr. Scott noted in his report that Ivan Miller was 'physically abusive and frequently hit [Miller] on various areas of his body with his hands or with a belt.' [Miller's Rule 32 Exhibit 29–0003.] Dr. Scott also testified concerning Ivan's physical abuse of Miller during the penalty phase of Miller's trial. [Direct Appeal, R. 1350–51.]

"Miller now claims that his trial counsel was ineffective for not providing Dr. Scott more information on the details of the abuse. However, Dr. Scott was aware of specific incidents of abuse and testified during the penalty phase about an occasion when Ivan tried to stab Miller. [Direct Appeal, R. 1351.] Notably, Miller failed to present any further evidence during the evidentiary hearing of specific details or occurrences of physical abuse. In fact, none of Miller's reported injures were linked to any form of abuse; Miller's expert Dr. Boyer testified that there was no indication in Miller's medical records how any of his injuries occurred and that there were no serious wounds that required overnight hospital stays. [February 2008 Rule 32 Hearing, R. 740.] The record indicates that Dr. Scott was aware of the nature of Ivan's physical abuse; Miller has failed to provide any evidence of other specific incidents of abuse or how such undocumented incidents would have impacted Dr. Scott's analysis. Accordingly, Miller has failed to demonstrate that he was prejudiced."

(C. 2021–22.)

The circuit court's findings are supported by the record.

b.

Miller argues that he was "severely prejudiced" by his trial counsel's failure to provide the information addressed in Part II.C.1.a(i)-(v), supra, to Dr. Scott. (Miller's brief, II(B)(2)(a)(1)(F), at 50–55; Miller's reply brief at 17–25.) Miller states that when Dr. Catherine Boyer, a psychologist retained for the Rule 32 proceedings, reviewed all the materials that he contends his trial counsel should have provided to Dr. Scott and administered additional tests on Miller, she concluded that Miller suffered from post-traumatic stress disorder with dissociative features. Dr. Boyer testified that she believed Miller had experienced a "dissociative episode" during the shootings that impaired his ability to appreciate the nature and quality or wrongfulness of his acts. (February 2008 Rule 32 Hearing, R. 714–718.) Miller asserts that had trial counsel furnished Dr. Scott with the information discussed in Part II.C.1.a(i)-(v), supra, Dr. Scott may have determined that Miller was suffering from a mental disease or defect at the time of the shootings.

The circuit court stated:

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"Miller has failed to demonstrate a reasonable probability that the outcome of his proceeding would have been different ***385** had his trial counsel investigated more mental health evidence because he has failed to prove that he met the legal definition of insanity under Ala.Code [1975] § [13A–3–1]. None of the five psychological and psychiatric experts who evaluated Miller during the course of his trial or his Rule 32 proceedings, including Drs. Hooper, Scott, McDermott, McClaren, and Boyer concluded that Miller was legally insane. Therefore, even if trial counsel had conducted a more thorough mental health investigation, the result would be the same: Miller could not have proven that he did not appreciate the wrongfulness of his actions and thus could not have sustained a not-guilty by reason of insanity defense.

"Miller's failure to demonstrate prejudice is highlighted by the testimony of Miller's own expert, Dr. Boyer, during the evidentiary hearing. Despite her opinion that Miller suffered from post-traumatic stress disorder, incredibly, Dr. Boyer failed to testify that Miller was legally insane. [February 2008 Rule 32 Hearing, R. 757–58.] Notably, Dr. Boyer failed to even provide an opinion. Clearly evading the issue of Miller's sanity, in response to a question regarding whether she disagreed with Dr. Scott's testimony during trial that Miller was not insane, Dr. Boyer testified 'I really don't know if I can answer it.' [February 2008 Rule 32 Hearing, R. 757.]

"As Dr. Boyer stated in response to a question from counsel for the State, if she had been called to testify on Miller's behalf during trial, she would have had no opinion as to whether he could appreciate the wrongfulness of his conduct at the time of the shootings:

> " 'Q: So in this case it's fair to say that had you been there you would have said I have no opinion [as to Miller's sanity] one way or the other?
>
> " 'A: Yes.'

"[February 2008 Rule 32 Hearing, R. 758.] Without offering an opinion, let alone an opinion that conflicted with the evaluations performed during trial, even if a mental health investigation was performed in the manner in which Miller now alleges it should have been conducted, Miller has failed to demonstrate a reasonable probability that additional mental health evidence would have been uncovered that would have affected the outcome of his trial. It is also significant that Dr. Scott failed to state during the evidentiary hearing that his opinion that Miller was not insane at the time of the shootings had changed. No evidence has been presented that Miller was legally insane and ample mental health evidence was already available for trial counsel to effectively argue during the penalty phase that Miller satisfied the requirements for the statutory mitigating circumstances under Ala.Code [1975] § 13A–5–51(2) and (6).

"Three psychologists and one psychiatrist evaluated Miller at the time of trial; none of these four doctors, whether hired by the defense or appointed by the trial court, found that Miller was insane. [February 2008 Rule 32 Hearing, R. 248.] Miller has offered nothing in the testimony of either Dr. Boyer or Dr. Scott to call these evaluations into question. There is no evidence that Dr. Boyer's testimony would have benefited Miller's defense, nor would it have impacted the outcome of the proceedings. Miller has failed to meet his burden of proof of demonstrating how he was prejudiced under *Strickland* by his trial counsel's investigation into his mental health. Therefore, Miller cannot demonstrate that his trial counsel's performance in this regard was constitutionally ineffective...."

(C. 2023–26.)

The circuit court's findings are supported by the record. As noted above, to ***386** have been entitled to relief, Miller not only had to show that his trial counsel rendered deficient performance by not providing the additional information to Dr. Scott for his consideration in assessing Miller's sanity at the time of the offenses, but also had to prove that he was prejudiced as a result of his trial counsel's failure to provide the information to Dr. Scott. The fact that Dr. Scott *might* have changed his conclusion regarding Miller's sanity at the time of the offenses had he received the information is not sufficient to establish the requisite prejudice.

> "With respect to prejudice, a challenger must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [*Strickland,* 466 U.S. at 694], 104 S.Ct. 2052. It is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.' *Id.,* at 693, 104 S.Ct. 2052. Counsel's errors must be 'so

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serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' *Id.*, at 687, 104 S.Ct. 2052.

" 'Surmounting *Strickland*'s high bar is never an easy task.' *Padilla v. Kentucky,* 559 U.S. 356, ——, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland,* 466 U.S., at 689–690, 104 S.Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is 'all too tempting' to 'second-guess counsel's assistance after conviction or adverse sentence.' *Id.*, at 689, 104 S.Ct. 2052; see also *Bell v. Cone,* 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell,* 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not whether it deviated from best practices or most common custom. *Strickland,* 466 U.S., at 690, 104 S.Ct. 2052."

Harrington v. Richter, —— U.S. ——, ——, 131 S.Ct. 770, 787–88, 178 L.Ed.2d 624 (2011).

c.

[14] Miller contends that even though his trial counsel withdrew the plea of not guilty be reason of mental disease or defect, his trial counsel should still have presented evidence of Miller's mental illness during the guilt phase of the trial. (Miller's brief, II(B)(2)(a)(ii), at 55–60.) Miller asserts that although Dr. Scott concluded that Miller was not suffering from a mental disease or defect at the time of the shootings, Dr. Scott nevertheless found that Miller was suffering from a mental illness. Thus, Miller asserts that when his trial counsel received Dr. Scott's equivocal findings regarding Miller's mental health, his trial counsel could have pursued several options, namely: (1) trial counsel could have had Miller evaluated by another mental-health professional to whom trial counsel had supplied all of the materials discussed in Part II.C.1a(i)-(v), supra, to determine if that mental-health expert found Miller to be suffering from a mental ***387** disease or defect at the time of the crimes;[5] (2) trial counsel could have had Dr. Scott testify during the guilt phase of the trial that in his opinion Miller suffered from a mental illness; and (3) trial counsel could have presented Miller's mental-health evidence in support of an argument that Miller lacked the requisite intent to be convicted of the capital offense of killing two or more persons pursuant to one scheme or one course of conduct and that he was guilty only of a lesser-included offense, such as murder or manslaughter.

Although Miller presents this argument in his brief as part of his claim that his trial counsel were ineffective for withdrawing the not-guilty-by-reason-of-mental-disease-or-defect plea, this claim was presented in a different context in his amended Rule 32 petition. (Miller's Amended Rule 32 petition, C. 319–22.) In his amended Rule 32 petition, Miller claimed that his trial counsel were ineffective for not presenting a defense in the guilt phase of the trial, and that is the context in which the circuit court addressed Miller's claim.

The circuit court stated the following in its order:

"In paragraphs 173–85 of his amended petition, Miller claims that his trial counsel were ineffective for failing to present a defense theory or evidence during the guilt phase of the trial. [Amended Rule 32 petition, C. 319.] Miller argues that trial counsel could have presented the testimony of Dr. Scott or arguments based on Dr. Scott's findings that Miller could not form the intent to commit capital murder based on his delusional disorder or that Miller should only be convicted of manslaughter.

"This Court denies Miller's claim because he has failed to meet his burden of proof of demonstrating that his trial counsels' performance was deficient under *Strickland,* 466 U.S. at 687, Ala. R.Crim. P., 32.7(d). Trial counsel Johnson had reasonable strategic reasons for not presenting evidence during the guilt phase of trial. Johnson testified that his trial strategy focused on presenting the best evidence and testimony that would save Miller's life. [Motion for New Trial hearing, R. 80.] Based on the facts and circumstances of his case, Johnson determined that his best opportunity and most effective method of

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presenting such testimony would be during the penalty phase. [Motion for New Trial Hearing, R. 80; February 2008 Rule 32 Hearing, R. 219.] Part of this strategy also involved gaining credibility and favor with the jury by not presenting frivolous arguments during the guilt phase such as challenging the blood spatter expert's testimony. [February 2008 Rule 32 Hearing, R. 219–26.]

"Johnson testified that the prosecution's evidence was strong, that he could not contest the fact that the shootings were part of a single act, and that he made a strategic decision to not put on frivolous evidence during the guilt phase. [Motion for New Trial Hearing, R. 14; February 2008 Rule 32 Hearing, R. 99, 219.] Johnson felt that any potential testimony about Miller's mental health during the guilt phase would be less impactful or even frivolous. [Motion for New Trial Hearing, R. 80.] However, Johnson stated that he wanted Miller to testify on his own behalf during the guilt phase and talked with Miller about this possibility, but Miller refused. [February 2008 Rule 32 Hearing, R. 220.] Finally, Johnson acknowledged ***388** that it was not uncommon to not present evidence during the guilt phase and to focus solely on the penalty phase. [February 2008 Rule 32 Hearing, R. 228.]

"Johnson's conclusions on the strength of the prosecution's case in the guilt phase are well supported by the evidence. As the Court of Criminal Appeals recognized on direct appeal, '[g]iven the overwhelming evidence of Miller's guilt—including eyewitness testimony identifying Miller as the shooter—counsel has little choice but to acknowledge Miller's guilt.' *Miller,* 913 So.2d at 1162. Johnson and cocounsel Blackwood faced the daunting task during the guilt phase of defending Miller against strong evidence which included two separate eyewitnesses to the shootings at both Ferguson Enterprises and Post Airgas.

"Despite this evidence, this is not a case in which trial counsel failed to investigate potential guilt phase testimony. As noted above, Johnson initially hired Dr. Scott to investigate Miller's mental health with the intention of presenting evidence during the guilt phase that Miller could not appreciate the wrongfulness of his actions. [February 2008 Rule 32 Hearing, R. 48.] However, after Dr. Scott determined that Miller did not qualify for the insanity defense under Alabama law, Johnson withdrew the not guilty by reason of mental defect plea. [February 2008 Rule 32 Hearing, R. 91.]

"As the Court of Criminal Appeals noted, this decision was made 'after a thorough investigation of the relevant law and facts of Miller's case' and Johnson's focus on the penalty phase 'was part of his strategy to spare Miller's life.' *Miller,* 913 So.2d at 1161 (holding that '[u]nder the circumstances of this case, defense counsel made a well-reasoned decision to focus his efforts on that part of the trial that he believed offered the greatest chance of success. We see no reason to second-guess defense counsel's decisions regarding this strategy.') Miller has failed to offer any proof that this trial strategy was not the product of a reasonably competent attorney.

"Contrary to Miller's claims, Johnson also had strategic reasons for not presenting Dr. Scott's testimony during the guilt phase in an attempt to argue that Miller did not have intent to commit capital murder. [February 2008 Rule 32 hearing, R. 222.] First, Johnson testified that in his opinion, Dr. Scott's testimony would have had more of an impact during the penalty phase based on the information available for Dr. Scott to present. [February 2008 Rule 32 Hearing, R. 285.] Johnson stated that much of Dr. Scott's testimony during the penalty phase was based on hearsay and therefore, Dr. Scott would have been more limited in providing testimony in the guilt phase. [February 2008 Rule 32 Hearing, R. 284.] Johnson also determined that Dr. Scott would have been subject to a more stringent cross-examination during the guilt phase. [February 2008 Rule 32 Hearing, R. 284.] Therefore, as Johnson acknowledged, he could not have simply introduced the beneficial, limited parts of Dr. Scott's report; instead the entire report could have been subject to cross-examination. [February 2008 Rule 32 Hearing, R. 100.]

"Dr. Scott's own report contained opinions which could have rebutted any argument that Miller did not have the intent to commit murder as a result of a delusional disorder. Despite the fact that Dr. Scott opined that Miller suffered from a delusional disorder, Dr. Scott stated that:

> ***389** " 'because Mr. Miller followed a second victim, shot the first victim again before he left Ferguson Enterprises and because he went to a second work site, it is my opinion that the evidence indicates he appreciates the nature and quality of his actions toward each victim.'

"[Miller's Rule 32 Exhibit, 29–0022.] Miller's own expert's opinion was consistent with the very same facts that the prosecution presented during the trial to argue that Miller intended to commit murder. [Direct Appeal, R. 1254–61,

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1264–75.] Based on the facts of this case, trial counsel's decision to not present evidence during the guilt phase and instead focus on the penalty phase was reasonable and Miller has failed to present any evidence demonstrating how this strategy was deficient."

(C. 2049–54.)

The circuit court also found that Miller failed to meet his burden of proving that he was prejudiced by trial counsel's decision not to present mental-health evidence during the guilt phase of the trial. The circuit court stated:

"Miller's expert, Dr. Scott, testified during the penalty phase of trial that Miller was not unable to appreciate the wrongfulness of his actions and therefore did not meet the legal definition of insanity under Alabama law. [Direct Appeal, R. 1384.] The only other possible strategy that Miller has alleged that trial counsel could have pursued during the guilt phase centered on arguing that Miller did not have the intent to commit capital murder.

"However, such an argument would have run contrary to the overwhelming evidence indicating Miller's intent to commit murder. Johnny Cobb, an employee at Ferguson Enterprises, heard shouting, witnessed Miller walk out of the front door of the office with a pistol towards his truck, and drive away. *Miller,* 913 So.2d at 1154. Cobb then entered the building and saw Christopher Yancy and Lee Holdbrooks on the floor. *Id.* Yancy was shot three times and Holdbrooks was shot six times with the fatal shot being fired as Holdbrooks looked up at Miller. *Id.* at 1156.

"Andy Adderhold witnessed Miller arrive at Post AirGas, walk into the office, specifically call out to Terry Jarvis, and then repeatedly shoot Jarvis. *Id.* at 1155. Miller then ordered Adderhold out of the office, but Adderhold still heard a final gunshot as he left the building. *Id.* Jarvis was shot five times with the fatal shot to Jarvis' heart occurring when Miller was standing directly over him. *Id.* at 1156.

"Miller cannot demonstrate a reasonable probability that had trial counsel presented evidence in the guilt phase to challenge Miller's intent that the outcome of his trial would have been different in the face of these brutal facts. Miller specifically sought out two victims, shot them multiple times, proceeded to another location, specifically sought out another victim, and shot him multiple times. Miller's own expert indicated that such evidence indicates that Miller could 'appreciate the nature and quality of his actions towards each victim.' [Miller's Rule 32 Exhibit 29–0022.] Even if Miller could demonstrate that his trial counsel were deficient during the guilt phase, which he cannot, he has failed to demonstrate how he was prejudiced under *Strickland* by his trial counsels' strategy."

(C. 2054–56.)

[15] **[16]** The circuit court's findings are supported by the record. Miller's trial counsel had four opinions from mental-health experts, each of whom had evaluated ***390** Miller and concluded that Miller did not meet Alabama's legal definition of "insanity" at the time of the crimes. Accordingly, Miller's trial counsel did not render ineffective assistance by not expending valuable, limited resources in pursuit of a fifth mental-health expert who may or may not have found that Miller met Alabama's legal definition of "insanity" at the time of the shootings.

" 'Counsel is not ineffective for relying on an expert's opinion.' *Smith v. State,* 71 So.3d 12, 33 (Ala.Crim.App.2008).

" '[T]rial counsel had no reason to retain another psychologist to dispute the first expert's findings. "A postconviction petition does not show ineffective assistance merely because it presents a new expert opinion that is different from the theory used at trial." *State v. Combs,* 100 Ohio App.3d 90, 103, 652 N.E.2d 205, 213 (1994). See also *State v. Frogge,* 359 N.C. 228, 244–45, 607 S.E.2d 627, 637 (2005). "Counsel is not ineffective for failing to shop around for additional experts." *Smulls v. State,* 71 S.W.3d 138, 156 (Mo.2002). "Counsel is not required to 'continue looking for experts just because the one he has consulted gave an unfavorable opinion.' *Sidebottom v. Delo,* 46 F.3d 744, 753 (8th Cir.1995)." *Walls v. Bowersox,* 151 F.3d 827, 835 (8th Cir.1998).'

"*Waldrop v. State,* 987 So.2d 1186, 1193 (Ala.Crim.App.2007)."

James v. State, 61 So.3d 357, 368–69 (Ala.Crim.App.2010).

Furthermore, after having made the strategic decision to withdraw Miller's not-guilty-by-reason-of-mental-disease-or-defect plea which, as discussed, was not unreasonable, trial counsel was not ineffective for declining to introduce evidence of Miller's mental illness during the guilt phase of the trial. As Miller's trial counsel explained at the Rule 32

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hearing, he thought that "the jury might have considered that [evidence of Miller's mental-health problems] to be frivolous because ... Alabama does not recognize diminished capacity [as a defense] unless it's diminished to the point that it becomes the defense of insanity." (February 2008 Rule 32 Hearing, R. 263.)

Miller's trial counsel was correct that Alabama does not recognize "diminished capacity" as a defense, as addressed in the case of *Barnett v. State,* 540 So.2d 810 (Ala.Crim.App.1988):

> "Barnett argues that the issue of his mental state should have been submitted to the jury under instructions that it could negate the intent requirement for murder, thereby reducing the killing to manslaughter. This contention embodies the concept of 'diminished capacity' or 'diminished responsibility,' and was specifically rejected by the draftsmen of our criminal code. See Ala.Code [1975] § 13A–6–3 (Commentary at 158):
>
> > " 'Under § 13A–6–3(a)(2), it was originally proposed to replace the "heat of passion" due to provocation criterion with "extreme mental or emotional disturbance," ... which approach is being adopted by many modern criminal codes.... This standard originated in the Model Penal Code § 210.3 and is discussed in Commentary, (Tent. Draft No. 9) pp. 28–29.
> >
> > " '*However, some members of the Advisory Committee considered the proposal unsound, unclear and susceptible of abuse, so it was not adopted,* and § 13A–6–3(a)(2) retains the "heat of passion" under legal provocation defense.' § 13A–6–3 Commentary (emphasis added).
>
> "See also *Neelley v. State,* 494 So.2d 669, 682 (Ala.Cr.App.1985), affirmed, *Ex* ***391** *parte Neelley,* 494 So.2d 697 (Ala.1986) cert. denied, *Neelley v. Alabama,* 480 U.S. 926, 107 S.Ct. 1389, 94 L.Ed.2d 702 (1987); *Hill v. State,* 507 So.2d 554, 556 (Ala.Cr.App.1986), cert. denied, *Ex parte Hill,* 507 So.2d 558 (Ala.1987).
>
> "Although Alabama adopted the criterion for insanity contained in § 4.01 of the Model Penal Code, it did not adopt the accompanying section of the Model Penal Code, § 4.02(1), which provided that '[e]vidence that the defendant suffered from a mental disease or defect is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind which is an element of the offense.' Compare Model Penal Code § 4.02 (A.L.I.1980) with Ala.Code § 13A–3–1 (1975). See § 13A–3–1 Commentary.
>
> " 'The rule applied in this jurisdiction is sometimes referred to as the "all-or-nothing" approach.' *Hill,* 507 So.2d at 556. Under this approach, a 'defendant must either establish his insanity as a complete defense to or excuse for the crime, or he must be held to full responsibility for the crime charged.' Annot., 22 A.L.R.3d 1228, § 4 at 1236 (1968).
>
> "Accordingly, Barnett was not entitled to a charge on reckless manslaughter on the theory of diminished mental capacity. This court's conclusion in *Hill,* 507 So.2d at 556–57, is equally applicable here:
>
> > " 'If the jury in the present case had found that appellant Hill was suffering from a mental disease or defect at the time she shot the decedent and that that disease or defect produced the act, then she could be found not guilty by reason of mental defect. In that event, a charge on the lesser included offense would not be needed. *If, on the other hand, she was found to be sane at the time of the murder, a lesser included offense charge on reckless manslaughter should be given only if the facts of the particular case—facts unrelated to any diminished mental capacity—would warrant the giving of such a charge*.... Here, the appellant admitted taking the gun from a dresser drawer, pointing it at the head of the decedent and shooting him in the head repeatedly. Her actions were not consistent with a finding of recklessness. Since there was no evidence in the present case that would support an instruction on reckless manslaughter, the trial court did not err in denying the appellant's charge.' 507 So.2d at 556–57 (citation omitted)."

540 So.2d at 812 (some emphasis in original; some emphasis added). See also, *Sharifi v. State,* 993 So.2d 907, 932–33 (Ala.Crim.App.2008), cert. denied, *Sharifi v. Alabama,* 555 U.S. 1010, 129 S.Ct. 491, 172 L.Ed.2d 386 (2008) (finding no merit to appellant's contention that Alabama's rejection of the diminished-capacity doctrine is unconstitutional).

Miller failed to prove that he was entitled to a charge on the lesser-included offense of manslaughter. The facts in this

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particular case that are "unrelated to any diminished mental capacity" did not warrant such a charge. In fact, on direct appeal, this Court specifically rejected Miller's assertion that his trial counsel were ineffective for not presenting evidence during the guilt phase of "Miller's delusions to show the murders were committed in a heat of passion, rather than as part of a common scheme or plan." *Miller,* 913 So.2d at 1161. We reasoned:

> "The fact that a victim may have spread rumors about the defendant or 'smarted off' to a defendant is insufficient to mitigate an intentional killing under any doctrine of provocation or ***392** heat of passion. See, e.g., *Bone v. State,* 706 So.2d 1291, 1297 (Ala.Crim.App.1997) (citing *Harrison v. State,* 580 So.2d 73, 74 (Ala.Crim.App.1991) (mere words or gestures will not reduce a homicide from murder to manslaughter))."

913 So.2d at 1161.

Miller did not meet his burden of proving that his trial counsel were ineffective for withdrawing his plea of not guilty by reason of mental disease or defect for not presenting evidence of Miller's mental illness during the guilt phase. Accordingly, because Miller's underlying claim of ineffective assistance of trial counsel has no merit, Miller failed to prove by a preponderance of the evidence that his appellate counsel were ineffective in the manner in which they presented this claim of ineffective assistance of trial counsel in the post-sentencing proceedings. *Payne,* 791 So.2d at 401.

2.

[17] Miller contends that his trial counsel rendered ineffective assistance in his opening statement in the guilt phase of the trial. Specifically, Miller maintains that rather than focusing the jury on a defense theory, his trial counsel invited the jury to feel only contempt for him. (Miller's brief, II(B)(2)(b), at 68–70; Miller's reply brief, at 34–35.)

As noted, this claim was raised in the motion for a new trial and was rejected by the circuit court. On direct appeal to this Court, Miller asserted that "his counsel's opening remarks [in the guilt phase] indicated that counsel was serving 'more like a second prosecutor' rather than defense counsel." *Miller,* 913 So.2d at 1161. We rejected this claim, reasoning:

> "Under the circumstances of this case, defense counsel made a well-reasoned decision to focus his efforts on that part of the trial that he believed offered the greatest chance of success. We see no reason to second-guess defense counsel's decision regarding this strategy."

913 So.2d at 1161.

Miller contends that had his appellate counsel effectively argued in the post-sentencing proceedings that his trial counsel's opening statement was ineffective, Miller would have been entitled to relief.

Defense counsel Johnson's opening statement was brief. After introducing himself and his cocounsel, Johnson said:

> "We are at a part of the process here that the law says is necessary. We all, at this point, have been assigned responsibilities. My responsibility and Mr. Blackwood's responsibility is to make sure that in this case, as in any other case, that we keep the burdens where the law says the burdens belong, that we challenge any evidence or any statement that is made that we think is wrong.
>
> "Our responsibility, however, is not—and is not ever the responsibility of a lawyer to do things frivolous. And we will not do that in this case.
>
> "Since August the 5th of 1999, I have probably had dozens, if not hundreds, of cameras and microphones and tape recorders stuck in my face asking me what happened here, I guess presumably on the theory that I would disclose something that would make all of this seem logical.
>
> "I have not said anything that makes this seem logical and reasonable because I don't know anything. You won't hear anything coming from the defense that makes this seem

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logical and reasonable. To present anything in that regard would be frivolous. We will not engage in frivolity.

"The responsibility that Mr. Blackwood and I have we accept and we will do what our responsibility is, but we will ***393** not do anything frivolous. That would be irresponsible.

"I will not offer you any evidence in this case that would make this act seem any less brutal and any less inhumane than it was. If you want to know what happened in this case, I think you just got a pretty good recitation of what happened in this case. I think Mr. Owens [the prosecutor] got most of it right. Some of it seems to me to be a little embellished, but so what. Fundamentally, you heard what happened.

"Now, the most serious responsibility in this case is placed on you. And you have gone through the process of jury selection and you are the ones who survived the process of jury selection.

"And you did not survive because you don't have opinions about this case. You would be—it would be unnatural, from what most of you have seen and heard, not to have an opinion in this case. You survived because you have said we will not let our opinions affect the responsibility that is placed on us in this case.

"The responsibility that is placed on you in this case will be an awesome one, but I suggest this to you, at the end of this case—you will have to make at least two decisions in this case that places more responsibility on you than I will ever have in any case I will ever stand for in a courtroom.

"But at the end, if you accept your responsibility in the same way I—that everyone else, not just me, that everyone else in this courtroom is accepting theirs, then at the end of this, when this is all over, you will be proud. You won't be ashamed, you will be proud of a least what you have done.

"I don't expect that at any point in this case you will ever be anything but ashamed of what happened that caused us to be here. I'm not going to ask—for me to suggest anything to the contrary would be frivolous. You won't see anything frivolous done in this case.

"You will see a lot of meaningful things, though, presented to you. There will be a lot of meaningful evidence and a lot of meaningful arguments made to you. The only thing I ask at this point is that you accept your responsibility as jurors and then we will all be proud that we participated in this. Thank you."

(Direct Appeal, R. 813–16.)

During the hearing on the motion for a new trial, Johnson said that his primary emphasis was on saving Miller's life. Johnson indicated that in order to reach that objective, in his opening statement he sought to dispel the resentment the jurors might harbor toward Miller because the jurors felt the trial was a waste of time because of the overwhelming evidence of Miller's guilt. Johnson explained that during voir dire at trial a veniremember told the court that he had overheard other veniremembers expressing their opinion that the trial was a waste of time. [6]

Johnson testified as follows at the hearing on the motion for new trial:

"I believed that the only thing that the State could possibly do wrong in this case would be to overkill. I was trying to posture to make that seem to be the case, that we could not do anything that would not seem to the jury to be frivolous, especially on the heels of what I would have known, I think, intuitively.

***394** "But this is the only time I've ever had a juror sit there and tell me 'that we all think this is a waste of time' or something to that effect. So I thought it was important that the jury understand, and I believe I asked the Court to instruct the jury that this trial was not something that the defendant was putting them through, but something that the law was putting them through. So that was just sort of the nature and the context in which [opening statement] was presented."

(Motion for New Trial Hearing, R. 59.)

Johnson said that he wanted to emphasize to the jurors that the guilt phase of the trial process was very important and that the jurors played a very significant role in that process —a civic duty the jurors should take pride in performing— and that the trial was not a waste of time despite the fact that the "evidence was largely uncontradicted." (Motion for New Trial Hearing, R. 62–63.) Johnson's testimony in the Rule 32 hearing was similar in this regard. (February 2008 Rule 32 Hearing, R. 137–43.)

The circuit court held that Miller failed to meet his burden of proving that his trial counsel rendered ineffective assistance

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in what he said in his opening statement at the guilt phase of the trial. The court stated in its order denying Miller's Rule 32 claim:

> "Trial counsel Johnson's opening statement was the product of a reasonable, strategic decision to win favor with the jury by not presenting frivolous arguments in order to spare Miller's life. Miller has not presented any evidence to demonstrate Johnson's strategy was unreasonable."

(C. 2048.)

The circuit court also denied relief on this claim because Miller failed to establish the requisite prejudice. The court stated:

> "Miller has presented no evidence concerning the impact of Johnson's statements on the jury, nor has Miller demonstrated a reasonable probability that the outcome of the guilt phase would have been [different] had Johnson not made these statements. In general, statements of counsel 'are usually valued by the jury at their true worth and are not expected to become factors in the formation of the verdict.' *Minor v. State,* 914 So.2d 372, 417 (Ala.Crim.App.2004). Miller has offered nothing more in support of his claim than the bare, conclusory allegation that Johnson's opening statement was improper and that it prejudiced the jury, without proving specific facts that demonstrate prejudice. Accordingly, Miller has not met his burden of demonstrating prejudice under *Strickland* and therefore, this claim is denied."

(C. 2048–49.)

We find no abuse of discretion in the circuit court's findings.

> "Attorneys representing capital defendants face daunting challenges in developing trial strategies, not least because the defendant's guilt is often clear. Prosecutors are more likely to seek the death penalty, and to refuse to accept a plea to a life sentence, when the evidence is overwhelming and the crime heinous. See Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases,* 58 N.Y.U.L.Rev. 299, 329 (1983). In such cases, 'avoiding execution [may be] the best and only realistic result possible.' *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* § 10.9.1, Commentary (rev.ed.2003), reprinted in 31 Hofstra L.Rev. 913, 1040 (2003).
>
> ***395** "Counsel therefore may reasonably decide to focus on the trial's penalty phase, at which time counsel's mission is to persuade the trier that his client's life should be spared. Unable to negotiate a guilty plea in exchange for a life sentence, defense counsel must strive at the guilt phase to avoid a counterproductive course. See Lyon, *Defending the Death Penalty Case: What Makes Death Different?* 42 Mercer L.Rev. 695, 708 (1991) ('It is not good to put on a "he didn't do it" defense and a "he is sorry he did it" mitigation. This just does not work. The jury will give the death penalty to the client and, in essence, the attorney.'); Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty,* 83 Cornell L.Rev. 1557, 1589–1591 (1998) (interviews of jurors in capital trials indicate that juries approach the sentencing phase 'cynically' where counsel's sentencing-phase presentation is logically inconsistent with the guilt-phase defense); *id.,* at 1597 (in capital cases, a 'run-of-the-mill strategy of challenging the prosecution's case for failing to prove guilt beyond a reasonable doubt' can have dire implications for the sentencing phase). In this light, counsel cannot be deemed ineffective for attempting to impress the jury with his candor and his unwillingness to engage in 'a useless charade.' See [*United States v.*] *Cronic,* 466 U.S. [648], at 656–657, n. 19 [(1984)]. Renowned advocate Clarence Darrow, we note, famously employed a similar strategy as counsel for the youthful, cold-blooded killers Richard Loeb and Nathan Leopold. Imploring the judge to spare the boys' lives, Darrow declared: 'I do not know how much salvage there is in these two boys.... I will be honest with this court as I have tried to be from the beginning. I know that these boys are not fit to be at large.' *Attorney for the Damned: Clarence Darrow in the Courtroom* 84 (A. Weinberg ed.1989); see Tr. of Oral Arg. 40–41 (Darrow's clients 'did not expressly consent to what he did. But he saved their lives.'); cf. *Yarborough v. Gentry,* 540 U.S. 1, 9–10 (2003) (per curiam)."
>
> *Florida v. Nixon,* 543 U.S. 175, 191–92, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004). (Footnotes omitted.)

Miller failed to meet his burden of proving that his trial counsel's opening statement at the guilt phase constituted

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ineffective assistance. Therefore, it follows that Miller has also failed to prove by a preponderance of the evidence that his appellate counsel were ineffective in the manner in which they presented this claim of ineffective assistance of trial counsel in the post-sentencing proceedings. *Payne,* 791 So.2d at 401.

3.

Miller's appellate counsel argued in the motion-for-new-trial proceedings and on direct appeal that Miller's trial counsel were ineffective for not adequately investigating and presenting mitigating evidence in the penalty phase of the trial. The circuit court denied Miller's claim, as did this Court. In rejecting this claim, this Court wrote:

> "Miller further contends that trial counsel's failure 'to adequately explore all possible mitigating routes' left counsel unable to make well-informed decisions on the question of mitigation. As set out above, counsel testified at length regarding his representation of Miller, including his investigation of the relevant law and facts, and his strategy to save Miller from a sentence of death. Counsel explained his reasons for presenting evidence regarding Miller's family ***396** and social history through Dr. Scott's testimony, rather than through various family members. *Based on our review of the record, we fail to see what other mitigating evidence counsel could have offered. Moreover, despite Miller's allegations, he offers no additional mitigating evidence that counsel did not discover during his investigation or that counsel failed to consider in formulating his defense strategy. Accordingly, we are unable to say that counsel was ineffective as to this claim.* See *Lawhorn v. State,* 756 So.2d 971, 986 (Ala.Crim.App.1999)."

Miller, 913 So.2d at 1163 (emphasis added).

Miller alleges that there was a "mountain of compelling mitigating evidence available to trial counsel that was not presented at trial," and that, because of trial counsel's "grossly inadequate" investigation, the mitigating evidence was not discovered. (Miller's brief, II(B)(2)(c), at 71; Miller's reply brief, at 23–34.) He argues that trial counsel's investigation into the mitigating evidence failed to comply with the American Bar Association ("ABA") guidelines for conducting an appropriate investigation into potential mitigating evidence in death-penalty cases because: (1) trial counsel failed to adequately interview Miller and Miller's close relatives; and (2) trial counsel did not collect his "employment, educational, and medical records, and medical records of his numerous family members with documented serious mental illness." (Miller's brief, II(B)(2)(c)(i)(A) and (B), at 73–82; Miller's reply brief, at 23–29.) As a result, Miller maintains that his trial counsel did not learn about:

> "Mr. Miller's family, social, and mental health history, including (i) the extent of instability, poverty and hardship Mr. Miller suffered in childhood as a result of his father's constant uprooting of the family and erratic employment history; (ii) the extreme physical and psychological abuse Ivan [Miller's father] inflicted on the family, including the particular wrath he reserved for Mr. Miller; (iii) the well-documented history of mental illness of at least four generations of the Miller family; and (iv) Mr. Miller's strong work ethic, good employment history, financial support for his family, and loving family relationships."

(Miller's brief, at 75.)

Miller alleges that had his trial counsel presented this additional mitigating evidence at the penalty phase of the trial, he may not have been sentenced to death. (Miller's brief, II(B)(2)(c)(ii)(A)-(G), at 82–99; Miller's reply brief, at 29–34.) Additionally, he asserts that had his appellate counsel properly presented and supported this underlying claim of ineffective assistance of trial counsel in the motion-for-new-trial proceedings and on appeal with this additional information, he would have been entitled to relief. (Miller's brief, II(B)(2)(c)(v), at 110–17.)

a.

[18] First, we note that whether Miller's trial counsel's investigation into potential mitigating evidence adhered to the ABA guidelines is not dispositive of whether counsels' investigation was reasonable.

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"We have held that the ABA Guidelines may 'provide guidance as to what is reasonable in terms of counsel's representation, [but] they are not determinative.' *Jones v. State,* 43 So.3d 1258, 1278 (Ala.Crim.App.2007). [7]

***397** "The danger of adopting the ABA Guidelines as determinative on the issue of a lawyer's effectiveness was discussed by the United States Court of Appeals for the Fourth Circuit:

> " '[T]o hold defense counsel responsible for performing every task that the ABA Guidelines say he "should" do is to impose precisely the "set of detailed rules for counsel's conduct" that the Supreme Court has long since rejected as being unable to "satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland,* 466 U.S. at 688–89, 104 S.Ct. 2052, 80 L.Ed.2d 674. Such a categorical holding would lead to needless and expensive layers of process with the unintended effect of compromising process.... Recognition of the ABA Guidelines as the minimum prevailing community standard would transform defense lawyers' judgments into mindless defensive reactions to a potential habeas claim, divorced from the individualized needs of professional representation. Those needs call for more nuanced responses than can be provided by following preestablished mechanical rules of representation....
>
> " 'While the ABA Guidelines provide noble standards for legal representation in capital cases and are intended to improve that representation, they nevertheless can only be considered as part of the overall calculus of whether counsel's representation falls below an objective standard of reasonableness; they still serve only as "guides," *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052, not minimum constitutional standards.'

"*Yarbrough v. Johnson,* 520 F.3d 329, 339 (4th Cir.2008). See also *Torres v. State,* 120 P.3d 1184, 1189 (Okla.Crim.App.2005) ('[W]e will not find that capital counsel was per se ineffective simply because counsel's representation differed from current capital practice customs, even where the differences are significant. A defendant must still show that he was prejudiced by counsel's representation.'). We agree with the United States Court of Appeals for the Fourth Circuit.

"Also, the United States Supreme Court in *Wiggins [v. Smith,* 539 U.S. 510 (2003),] stated:

> " '[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.... [A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.
>
> " '... [O]ur principal concern in deciding whether [counsel] exercised "reasonable professional judgmen[t]" is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence ... was itself reasonable. In assessing counsel's investigation, we must conduct an ***398** objective review of their performance, measured for "reasonableness under prevailing professional norms," which includes a context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time." '

"539 U.S. at 521–23."

Ray, 80 So.3d at 982–83.

(i)

[19] With the aforementioned principles of law in mind, we turn to Miller's allegation that his trial counsel failed to adequately interview him and his family. The circuit court stated the following in its order:

> "In paragraphs 31–65 of his amended petition [C. 276–88], Miller alleges that his trial counsel failed to adequately investigate facts pertaining to his background and develop a mitigation case to present to the jury. [C. 276.] Miller claims that his trial counsel failed to utilize his family members as a source of information concerning Miller's unstable childhood and the physical and psychological abuse he received.

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"This claim is denied by this Court because it is directly refuted by the record and its therefore without merit. *See Gaddy v. State,* 952 So.2d 1149, 1161 (Ala.Crim.App.2006); *Duncan v. State,* 925 So.2d 245, 266 (Ala.Crim.App.2005). Trial counsel Johnson testified that he met with Miller personally 'at least half a dozen times.' [Direct Appeal, Motion for New Trial Hearing, R. 10.] During the evidentiary hearing, Johnson stated that he and co-counsel Bass interviewed Miller on numerous occasions from the beginning of their representation in August of 1999 up until the time of trial. [February 2008 Rule 32 Hearing, R. 32, 41, 45, 46.] Johnson stated that the purpose of these meetings involved conducting 'continued preparation for trial.' [February 2008 Rule 32 Hearing, R. 46–47.]

"Johnson also interviewed Miller's family members such as his father, mother, and his sisters with the specific focus of uncovering general background information and facts concerning his relationship with his father. [Motion for New Trial Hearing, R. 21–22.] Johnson met with the family on the day of the shootings on August 5, 1999, and spoke with his mother Barbara and his brother Richard in order to get family background information. [February 2008 Rule 32 Hearing, R. 38–39.] Bass had a thirty minute phone conversation with Barbara Miller on August 6, and hour long conversation with Lisa Miller, Miller's sister on August 29, and had discussions again with Barbara Miller on October 24 and November 8. [February 2008 Rule 32 Hearing, R. 40, 42, 44, 45.] Johnson testified that these meetings with Miller's family were part of an 'ongoing effort' to get helpful information and that Bass would have shared this information with him. [February 2008 Rule 32 Hearing, R. 41, 43–44.]

"Johnson himself met with Barbara Miller for a 90 minute conference on March 1, 2000, and also talked with Brian Miller, his cousin, and Lisa Carden, his sister. [February 2008 Rule 32 Hearing, R. 46, 163, 165.] Based on these interviews, Johnson testified that he learned information about Miller's background and upbringing. [February 2008 Rule 32, R. 165–66.] Additionally, trial counsel discovered from the interviews evidence of a family history of mental illness. [February 2008 Rule 32 Hearing, R. 80.] Johnson also recalled receiving information about Miller's upbringing and background as well as positive information about Miller from his brother Richard Miller. [February 2008 ***399** Rule 32 Hearing, R. 159.] Given that the records of both the motion for new trial hearing and the Rule 32 evidentiary hearing indicate that trial counsel met with Miller and his family numerous time for the purpose of developing information concerning his background and upbringing and therefore directly refutes Miller's allegation, this claim is denied. *See Gaddy,* 952 So.2d at 1161.

"This Court also denied Miller's claim because Miller has failed to meet his burden of proof of demonstrating that his trial counsel's performance was deficient under *Strickland,* 466 U.S. at 687. Ala. R.Crim. P. 32.7(d). As noted above, evidence was presented that trial counsel Johnson and Bass repeatedly interviewed Miller and his mother and spoke with his father, brother and sisters for the purpose of discovering information relating to Miller's upbringing and family background. [Motion for New Trial Hearing, R. 21–22; February 2008 Rule 32 Hearing, R. 38–46.] Miller failed to present any evidence during the evidentiary hearing that trial counsel failed to ask a specific question regarding his unstable childhood or his childhood history of abuse. Therefore, because the record is silent, trial counsel's performance in regard to his investigation and interviews of Miller and his family is presumed to be reasonable. *See Williams v. Head,* 185 F.3d 1223, 1228 (11th Cir.1999) ('Where the record is incomplete or unclear about [counsel's] actions, we will presume that he did what he should have done and that he exercised reasonable professional judgment.'); *Chandler v. United States,* 218 F.3d 1305, 1315 n. 15 (11th Cir.2000) (En Banc).

"Trial counsel was not deficient in the scope of family interviews conducted during his background information, despite Miller's laundry list of family members he alleges should have been interviewed: his father, Ivan Miller, his sisters, Lisa Carden and Cheryl Ellison, his brother, Richard Miller, his half-brother, Jeff Carr, his niece, Alicia Sanford, his nephew, Jake Connell, his cousin, Brian Miller, and his uncle, Perry Miller. [Amended Rule 32 Petition, C. 277–78.] Contrary to Miller's claims, trial counsel met with and interviewed, Ivan Miller, Richard Miller, Lisa Carden, and Brian Miller. [Direct Appeal, Motion for New Trial Hearing, R. 21–22; February 2008 Rule 32 Hearing, R. 159, 163, 165.] Neither Jeff Carr nor Perry Miller testified during the evidentiary hearing; therefore, there is no record whatsoever of whether these family members could have provided any relevant information.

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"Miller has failed to prove that trial counsel's investigation of his family members was not reasonable, nor has he demonstrated that all reasonably competent counsel would have also interviewed the additional family members Miller claims should have been interviewed.

"Regardless, trial counsel cannot be found deficient for failing to interview the remaining family members concerning information on Miller's life: Cheryl Ellison, Alicia Sanford and Jake Connell. First, information from Cheryl Ellison was ultimately obtained through her interview with Miller's psychiatric expert Dr. Scott. [February 2008 Rule 32 Hearing, R. 315.] Additionally, the evidence presented during the evidentiary hearing demonstrates that Ellison failed to provide any meaningful information. Although Cheryl Ellison stated that she knew of Miller since he was born, she also testified that she did not grow up with the immediate Miller family and stated that she spent 'very little' time with the Miller family throughout her childhood. [February 2008 Rule 32 ***400** Hearing, R. 501.] Ellison's testimony during the evidentiary hearing provided virtually no additional, relevant information concerning Miller's background other than general testimony that Ivan Miller was a bad person and irrelevant testimony concerning Miller's brother, Ivan Ray Miller's death and funeral. [February 2008 Rule 32, R. 500–525.]

"Furthermore, trial counsel had no reason to interview Miller's niece, Alicia Sanford and his nephew, Jake Connell. Alicia Sanford testified that she was 14 years old at the time of trial and did not attend Miller's trial, nor did she attend any family meetings with trial counsel. [February 2008 Rule 32 Hearing, R. 498–99.] Not only could trial counsel not have been aware of whether Alicia Sanford was available to testify, but it is unlikely that a witness 14 years old at the time of trial could have provided any background information whatsoever pertaining to Miller who was over twice her age. Similarly, trial counsel reasonably had no ability to be aware of Jake Connell's availability as a witness, nor could Connell provide any useful background information. Connell was 18 years old at the time of Miller's trial, did not spend much time growing up with Miller, and did not attend Miller's trial. [February 2008 Rule 32 Hearing, R. 584–85.]

"Finally, the investigation into Miller's childhood background and history of abuse through the interviews of family members was adequately performed by Dr. Charles Scott, the psychiatrist who testified during the penalty phase of Miller's trial. *See Hall v. State,* 979 So.2d 125, 163 (Ala.Crim.App.2007) ('It is neither unprofessional nor unreasonable for a lawyer to use surrogates to investigate and interview potential witnesses rather than doing so personally') (referencing *Harris v. Dugger,* 874 F.2d 756, 762 & n. 8 (11th Cir.1989)). Although Dr. Scott was not originally engaged by trial counsel for the express purpose of conducting a mitigation investigation, Johnson felt that Dr. Scott did 'a pretty thorough job of getting family history that he felt was relevant, employment history, all of those that you want to present some information about to a jury.' [February 2008 Rule 32 Hearing, R. 188, 222.] During the penalty phase of the trial, Dr. Scott confirmed the importance of his role in learning as much as he could about Miller's social background, personal history, as well as facts of Miller's case. [Record on Direct Appeal, R. 1348.]

"As part of his investigation, Dr. Scott met with Miller over a period of three days and conducted extensive interviews and examinations. [February 2008 Rule 32 Hearing, R. 314.] To confirm background information, Dr. Scott also interviewed Barbara Miller, his brother, Richard Miller, and his sister Cheryl Ellison. [February 2008 Rule 32 Hearing, R. 314–15.] After Dr. Scott's investigation was completed, Johnson then discussed with Dr. Scott the areas in which Dr. Scott could provide helpful mitigation testimony during the penalty phase of Miller's trial. [February 2008 Rule 32 Hearing, R. 190, 253–54.] Therefore, because trial counsel, both through his own investigation and through that of Dr. Scott, thoroughly inquired into the background and history of abuse in Miller's childhood, Miller has failed to meet his burden of proof of demonstrating that his trial counsel's investigation was deficient and this claim is denied."

(C. 1992–2000.) The circuit court's findings are supported by the record.

The circuit court also denied relief on this claim because the court found that ***401** Miller failed to establish the requisite prejudice, stating:

> "Even if Miller could have demonstrated that his trial counsel's investigation of his background was deficient, he cannot prove that he

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> was prejudiced because extensive testimony was nonetheless presented during the penalty phase of his trial regarding his unstable childhood and the physical and emotional abuse Miller suffered."

(C. 2000.) Miller's failure to prove prejudice is discussed in more detail, infra.

(ii)

[20] As noted above, Miller also asserts that his trial counsel were ineffective because, he claims, counsel did not gather multiple "important mitigating documents" that could have been presented in the penalty phase of the trial. However, in his claim in his amended Rule 32 petition, Miller asserted only that his trial counsel were ineffective for not gathering and investigating Miller's medical records. (C. 288–90.)[8] That is the specific allegation the court addressed.

The circuit court denied relief on this claim for several reasons. First the court found that Miller failed to meet the specificity requirements of Rule 32.6(b), Ala. R.Crim. P., because Miller made only the vague allegation that his trial counsel should have acquired records from three unnamed hospitals and Miller failed to present evidence at the evidentiary hearing of what specific hospital records his counsel should have investigated. (C. 2002.)

The circuit court also denied relief because, it found, Miller failed to meet his burden of proving that his trial counsel's performance was deficient in this regard, or that he was prejudiced by that performance. Specifically, the court stated:

> "Although trial counsel Johnson testified that he did not present Miller's medical records during trial, Miller failed to elicit any testimony during the evidentiary hearing from Johnson as to whether Johnson investigated or attempted to obtain Miller's medical records. [February 2008 Rule 32 hearing, R. 184.] Therefore, because the record is silent regarding trial counsel's investigation of Miller's medical records, and because trial counsel's conduct is presumed to be reasonable, this Court should also presume that trial counsel's investigation of Miller's medical history was reasonable. *Chandler v. United States,* 218 F.3d 1305, 1315 n. 15 (11th Cir.2000) ('An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption [because] "where the record is incomplete or unclear about [counsel's] actions, [the court] will presume that he did what he should have done, and that he exercised reasonable professional judgment." ')."

(C. 2003–04.)

The circuit court found that Miller failed to establish the requisite prejudice because, "[t]estimony was presented by Dr. Scott during the penalty phase of trial regarding injuries Miller received as a child—the exact information Miller now claims his trial counsel failed to investigate and provide to Dr. Scott." (C. 2004.) The court additionally noted that Miller's own Rule 32 expert, Dr. Boyer, " 'testified that she did not have any indication of the cause of Miller's injuries and was not aware of any medical records indicating that Miller had any overnight hospital ***402** stays as a result of his injuries.' [February 2008 Rule 32 Hearing, R. 739–40.]" The court's findings are supported by the record.

Miller now expands his list of documents that, he claims, his trial counsel should have gathered and investigated for mitigating evidence to include: (1) Miller's education records; (2) Miller's employment records; (3) mental-health records of Miller's family; and (4) Department of Human Resources records showing the poverty Miller experienced. (Miller's brief, at 80.) Because of the manner in which Miller presented this claim in his amended petition, the circuit court did not specifically address the additional documents Miller claims his trial counsel should have gathered and investigated for potential mitigating evidence. However, the effect of Miller's trial counsel's failure to gather these purportedly mitigating documents was addressed in the context of Miller's assertion that his trial counsel did not *present* readily available mitigating evidence, which is discussed later in this opinion.

[21] The circuit court's conclusion that Miller failed to meet his burden of proving that his trial counsel's performance in investigating potential mitigating evidence was unreasonable is supported by the record. As this Court has stated:

> " ' "[F]ailure to investigate possible mitigating factors and failure to present mitigating evidence at sentencing can constitute ineffective assistance of counsel under the Sixth Amendment." *Coleman* [*v. Mitchell*], 244 F.3d [533] at 545 [(6th Cir.2001)]; see also *Rompilla v. Beard,* 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d

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360 (2005); *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Our circuit's precedent has distinguished between counsel's complete failure to conduct a mitigation investigation, where we are likely to find deficient performance, and counsel's failure to conduct an adequate investigation where the presumption of reasonable performance is more difficult to overcome:

> " ' "[T]he cases where this court has granted the writ for failure of counsel to investigate potential mitigating evidence have been limited to those situations in which defense counsel have *totally* failed to conduct such an investigation. In contrast, if a habeas claim does not involve a failure to investigate but, rather, petitioner's dissatisfaction with the degree of his attorney's investigation, the presumption of reasonableness imposed by *Strickland* will be hard to overcome."

" ' *Campbell v. Coyle,* 260 F.3d 531, 552 (6th Cir.2001) (quotation omitted) (emphasis added); see also *Moore v. Parker,* 425 F.3d 250, 255 (6th Cir.2005). In the present case, defense counsel did not completely fail to conduct an investigation for mitigating evidence. Counsel spoke with Beuke's parents prior to penalty phase of trial (although there is some question as to how much time counsel spent preparing Beuke's parents to testify), and presented his parents' testimony at the sentencing hearing. Defense counsel also asked the probation department to conduct a presentence investigation and a psychiatric evaluation. While these investigatory efforts fall far short of an exhaustive search, they do not qualify as a complete failure to investigate. See *Martin v. Mitchell,* 280 F.3d 594, 613 (6th Cir.2002) (finding that defense counsel did not completely fail to investigate where there was "limited contact between defense counsel and family ***403** members," "counsel requested a presentence report," and counsel "elicited the testimony of [petitioner's] mother and grandmother"). Because Beuke's attorneys did not entirely abdicate their duty to investigate for mitigating evidence, we must closely evaluate whether they exhibited specific deficiencies that were unreasonable under prevailing professional standards. See *Dickerson v. Bagley,* 453 F.3d 690, 701 (6th Cir.2006).'

" *Beuke v. Houk,* 537 F.3d 618, 643 (6th Cir.2008). '[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying heavy measure of deference to counsel's judgments.' *Wiggins,* 539 U.S. at 521–22. 'A defense attorney is not required to investigate all leads....' *Bolender v. Singletary,* 16 F.3d 1547, 1557 (11th Cir.1994). 'A lawyer can almost always do something more in every case. But the Constitution requires a good deal less than maximum performance.' *Atkins v. Singletary,* 965 F.2d 952, 960 (11th Cir.1992). 'The attorney's decision not to investigate must not be evaluated with the benefit of hindsight, but accorded a strong presumption of reasonableness.' *Mitchell v. Kemp,* 762 F.2d 886, 889 (11th Cir.1985).

> " 'The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.'

" *Strickland v. Washington,* 466 U.S. at 691. 'The reasonableness of the investigation involves "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." ' *St. Aubin v. Quarterman,* 470 F.3d 1096, 1101 (5th Cir.2006), quoting in part *Wiggins,* 539 U.S. at 527."

Ray, 80 So.3d at 983–84.

This is not a situation where Miller's trial counsel conducted no investigation, or where trial counsel, like counsel in *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), had information that alluded to the defendant's troubled and difficult childhood but failed to conduct a more thorough investigation. Because Miller failed to prove that his trial counsel's performance in investigating potential mitigating evidence was unreasonable, Miller also failed to prove that the manner in which appellate counsel asserted this claim was deficient. *Payne,* 791 So.2d at 401.

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b.

[22] Miller argues that his trial counsel failed to present readily available mitigating evidence at the penalty phase of the trial. Miller maintains that had his trial counsel conducted a proper investigation into Miller's background, trial counsel "would have been able to inform the jury about the instability, violence and drug abuse to which [he] was exposed throughout his early life," and trial counsel could have presented "positive evidence concerning [him], his life, or his character." (Miller's brief, II(B)(2)(c)(ii), at 82–99; Miller's reply brief, at 29–34.)

Specifically, Miller contends that as a result of his trial counsel's failure to present sufficient mitigating evidence, neither the judge nor the jury learned of: (1) the extent of the physical and emotional abuse inflicted on Miller by his father (Miller's brief, at 87–90); (2) the poverty and rootlessness Miller experienced as a child (Miller's brief, at 90–92); (3) the unlawful behavior ***404** to which Miller was exposed during his upbringing (Miller's brief, at 92); (4) the Miller family's history of mental abuse (Miller's brief, at 93); (5) Miller's good employment history (Miller's brief, at 93–95); (6) Miller's loving relationship with his family (Miller's brief, at 95–98); (7) Miller's unusual behavior immediately before the shootings (Miller's brief, at 98–99).

In a related vein, Miller contends that his trial counsel were ineffective because they did not retain a mitigation expert, who, Miller claims, could have conducted a comprehensive mitigating investigation and who could have presented the resulting information to the jury "in a way that would allow the jurors to understand what caused [him] to shoot his three co-workers." (Miller's brief, II(B)(2)(c)(iii), at 99–104.) In support of this assertion, Miller argues that the testimony of his Rule 32 expert Dr. Catherine Boyer "demonstrated both the type of expert mitigation evidence that Trial Counsel failed to present and the resulting prejudice to [him.]" (Miller's brief, at 100.)

Miller maintains that had his trial counsel properly presented the readily available mitigating evidence, there is "reasonable probability" that the jury would not have recommended the death penalty and/or that the court would not have imposed the death penalty. Thus, Miller concludes, had his appellate counsel properly argued and supported this claim of ineffective assistance of counsel in the motion for a new trial and on appeal, he would have prevailed.

The circuit court addressed these contentions in its order denying Miller relief on these claims. We quote extensively from the court's order:

> "In paragraphs 238–64 of his amended petition [C. 338–46], Miller claims that his trial counsel were ineffective in presenting a mitigation case on Miller's behalf. Miller's claim contained numerous reasons in which he alleges trial counsel's mitigation presentation was ineffective. First, Miller claims that Dr. Scott's testimony was insufficient to present a mitigation case because Dr. Scott had not been retained as a mitigation expert. [C. 338.] Miller also claims that 'the jury never heard about the emotional and physical terror that Mr. Miller's father, Ivan, had inflicted upon Mr. Miller and his family.' [C. 339.] Miller alleges that the jury never heard about his troubled childhood, including the extent of the family's poverty, the family's frequent relocations, and the unlawful behavior and drug abuse that occurred in the Miller home. [C. 341.] Miller also claims that his trial counsel were ineffective for not presenting mitigation evidence through the following family members: his mother, Barbara, his siblings, Richard, Cheryl, and Jeff, his niece, Alicia, his nephew, Jake, and his cousin Brian. [C. 343.] Finally, Miller claims that the jury never heard positive information about his life such as the fact that he worked to provide money for his family and his good employment history. [C. 343–44.]
>
> "This Court denies Miller's claim because he has failed to meet his burden of proof of establishing that trial counsel's performance was deficient under *Strickland,* 466 U.S. at 687; Ala. R.Crim. P. 32.7(d). The basic thrust of Miller's claim is that his trial counsel should have done something more—i.e., that more mitigating evidence concerning his mental history, his personal background, and family background should have been presented during the penalty phase. When a claim is raised that trial counsel should have done something more, a court must first look at what trial counsel did. ***405** *Chandler* [*v. United States*], 218 F.3d [1305] at 1320 [(11th Cir.2000)]. ('Although Petitioner's claim is that his trial counsel should have done something more, we first look at what the lawyer did in fact.') Moreover, 'the mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel.' *Id.* at 1316 n. 20.

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"Johnson testified that he made a strategic decision to focus on the penalty phase of Miller's trial and that his specific theory of defense was that Miller suffered from a diminished capacity. [Direct Appeal, Motion for New Trial Hearing, R. 17, February 2008 Rule 32 Hearing, R. 219.] Accordingly, Johnson presented the testimony of Dr. Scott for this purpose in an effort to establish the existence of two statutory mitigating circumstances: that the capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance under Ala.Code [1975,] § 13A–5–51(2) and that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired under Ala.Code [1975] § 13A–5–51(6). [Record on Direct Appeal, R. 1343–91; February 2008 Rule 32 Hearing, R. 186–87.] Johnson had originally retained Dr. Scott to evaluate Miller in regard to an insanity plea; however, after Dr. Scott issued his report and the insanity plea was dropped, Johnson discussed with Dr. Scott the possibility of presenting the mental health evidence from Dr. Scott's evaluation in support of a mitigation case. [February 2008 Rule 32 Hearing, R. 181, 190, 253.]

"At trial, Dr. Scott provided testimony relating to Miller's psychological background as well as Miller's verison of the events on the day of the shooting in support of a diminished capacity strategy. Dr. Scott testified that Miller reported that he believed people were watching him and teasing him at work and that these feelings weighed on his mind. [Record on Direct Appeal, R. 1365–66, 1369.] Dr. Scott stated that Miller said the pressure of these thoughts kept building up in his mind and that the 'straw that broke the camel's back' occurred when he arrived at work at Ferguson Enterprises on August 5, 1999. [Record on Direct Appeal, R. 1373–75.] Dr. Scott also testified that Miller reported experiencing 'tunnel vision' and that Miller had difficulty recalling the events of the crime. [Record on Direct Appeal, R. 1375, 1378.] Based on this evidence, Dr. Scott opined that Miller did have a mental illness at the time of the shootings, specifically a delusional disorder, and that his ability to appreciate his conduct was substantially impaired. [Record on Direct Appeal, R. 1389–91.]

"Although the presentation of testimony supporting a diminished capacity theory was Johnson's main strategy, contrary to Miller's claims, Johnson also presented an array of mitigating evidence concerning Miller's background, family history, and positive information about his life through the testimony of Dr. Scott. Johnson did not hire Dr. Scott with the express purpose of investigating Miller's background, and in fact, Johnson and Dr. Scott agreed that he was not retained in the capacity of a mitigation expert. [February 2008 Rule 32 Hearing, R. 189, 311.] However, Dr. Scott did state that it was important for him to learn as much as he could about Miller's social background, educational background, and personal history during his evaluation. [Record on Direct Appeal, ***406** R. 1348.] Johnson testified Dr. Scott did a thorough job of investigating relevant family history and background information and could perform the role of presenting this information he discovered to the jury. [February 2008 Rule 32 Hearing, R. 222, 254.]

"Contrary to Miller's claims, evidence concerning the physical and emotional abuse inflicted on him personally by Miller's father, Ivan, and on his family was presented through the testimony of Dr. Scott. Dr. Scott testified that Ivan was 'verbally abusive' to Miller, that Ivan told Miller at a young age he would not amount to anything, and that Ivan called him a 'God damn son of a bitch.' [Record on Direct Appeal. R. 1350.] Dr. Scott also testified that Ivan was 'physically abusive' to Miller and frequently hit Miller which left bruises on him. [Record on Direct Appeal. R. 1350.] Dr. Scott told the jury about specific occurrences of Ivan's abuse when Ivan threatened to harm Miller with a large butcher knife. [Record on Direct Appeal, R. 1351.] Dr. Scott also noted that Miller witnessed Ivan's verbal and physical abuse to his mother, in which Ivan called her a 'whore' and frequently hit her 'very hard.' [Record on Direct Appeal, R. 1351.]

"Contrary to Miller's claim, evidence detailing Miller's impoverished childhood and unstable home environment was presented through Dr. Scott's testimony. Dr. Scott stated that Miller had 'an unusual early childhood' because his family frequently moved between Illinois, Alabama, and Texas as many as 7 to 10 times. [Record on Direct Appeal, 1349.] Dr. Scott testified that Ivan Miller often quit or lost his job and that the family lived 'on the edge of poverty a lot.' [Record on Direct Appeal, R. 1349.] Dr. Scott also informed the jury that drug abuse was present during Miller's childhood, noting that Ivan Miller 'abused marijuana quiet heavily' and injected drugs intravenously in Miller's presence. [Record on Direct Appeal, R. 1350.] Dr. Scott also provided details of Ivan Miller's eccentric behavior, testifying that Ivan thought he had the power to heal and that his father laid hands on Miller's brother and walked around the house spraying 'holy water.'

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[Record on Direct Appeal, R. 1350–51.] Additionally, Dr. Scott presented evidence of the family psychiatric history. [Record on Direct Appeal. R. 1362.] Dr. Scott noted Ivan Miller's erratic behavior and also testified that Miller's grandfather had been institutionalized and that his brother was considered slow. [Record on Direct Appeal, R. 1362–63.]

"Finally, contrary to Miller's claims, Dr. Scott provided positive evidence of Miller's character. Dr. Scott noted that Miller had a great, loving relationship with his mother, Barbara. [Record on Direct Appeal, R. 1351–52.] Dr. Scott told the jury that Miller quit school when he was in the eleventh grade so that he could work and provide money for his family. [Record on Direct Appeal, R. 1349–50.] Dr. Scott noted that Miller did not have a history of aggressive behavior and that Miller eventually graduated from high school. [Record on Direct Appeal, R. 1352–53.] Dr. Scott also testified that Miller did not have a history of any serious drug or alcohol abuse. [Record on Direct Appeal, R. 1356.] Dr. Scott also provided the jury with details of Miller's employment history, testifying that Miller had several jobs, usually left a job for a job that paid more money, and kept to himself during work. [Record on Direct Appeal, R. 1363.] In total, the scope of Dr. Scott's testimony was broad and provided many details of events throughout his lifetime ***407** and extensively covered various areas of his personal history.

"Based on the record of trial and the evidentiary hearing, this Court finds that trial counsel made a strategic decision to concentrate on presenting evidence during the penalty phase on Miller's diminished mental capacity that would support a finding of the existence of two statutory mitigating circumstances. Trial counsel also presented a wealth of evidence concerning Miller's background and family history. Trial counsel's strategy was successful in that two jurors recommended a sentence of life imprisonment and the trial court found the existence of three statutory mitigating circumstances. *Miller,* 913 So.2d at 1169.

"Simply because Miller alleges that more mitigating evidence could have been presented does not demonstrate that his trial counsel was ineffective. Trial counsel's decision was reasonable and strategic, and this Court will not 'second-guess' it. *See, e.g., Crawford v. Head,* 311 F.3d 1288, 1312 (11th Cir.2002) ('This court agrees that testimony from a mental health expert ... would have been admissible and might be considered to be mitigating. However, trial counsel chose to pursue a strategy of focusing the jury's attention on the impact of a death sentence on petitioner's family. This court will not second guess trial counsel's deliberate choice.'); *Boyd v. State,* 746 So.2d 364, 398 (Ala.Crim.App.1999) ('Trial Counsel stated that the defense strategy was to humanize Boyd for the jury ... [W]e do not find counsel's efforts to be ineffective.')

"This Court also finds that the trial counsel had tactical reasons for not presenting evidence or witnesses which Miller now alleges should have been presented during the penalty phase. *See, Payne v. State,* 791 So.2d 383, 404 (Ala.Crim.App.1999) ('When a decision to not put on certain mitigating evidence is based on a 'strategic choice,' courts have always found not ineffective performance.') Miller claims that a host of family members, particularly his mother, Barbara, should have been presented as witnesses during the penalty phase of trial.

"However, both trial counsel testified during the evidentiary hearing that they had specific, strategic reasons for not presenting Barbara Miller as a witness. Johnson testified that he talked with Barbara Miller in preparation for the penalty phase, considered calling her as a witness, and discussed this possibility with cocounsel Ronnie Blackwood. [February 2008 Rule 32 Hearing, R. 158, 229.] Johnson explained that his reason for not calling Barbara as a witness was that he felt she would not be effective as a witness:

> " 'I ... spent enough time with Alan's mother to be able to draw some conclusions ... about how effective she might be in that capacity ... I was concerned that with Alan's mother['s] demeanor that it might diminish that natural sympathy for a mother because I found her ... to be somewhat emotionally detached from the circumstances we were in.'

"[February Rule 32 Hearing, R. 177–78; 230–31.]

"Blackwood confirmed that trial counsel discussed the possibility of putting Barbara Miller on the stand. [February 2008 Rule 32 Hearing, R. 863–64.] Blackwood testified he spoke with Barbara Miller about testifying and that he talked with her about what she might testify to in regard to saving Miller's life if called. [February 2008 Rule 32 Hearing, R. 864.] During this conversation, ***408** Blackwood testified that Barbara Miller was 'very matter of fact' and also uttered a racially derogatory word.

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[February 2008 Rule 32 Hearing, R. 864–65.] Blackwood stated that Barbara Miller's demeanor and her use of this language contributed to the strategic decision to not call her as a witness. [February 2008 Rule 32 Hearing, R. 865.]

"Johnson provided another reason for not calling Barbara Miller as a witness stating that 'I didn't know that she had any background information that might be particularly important that wasn't already presented by Dr. Scott.' [February 2008 Rule 32 Hearing, R. 178.] Furthermore, Johnson testified that he decided during the penalty phase that there were not any other members of Miller's family whose testimony could have made an impact during the penalty phase. [February 2008 Rule 32 Hearing, R. 245.] Moreover, Johnson could not have even been aware of two of the family witnesses Miller now claims should have been called as witnesses during the penalty phase. Miller's nephew, Jake Connell, and his niece, Alicia Sanford, both testified during the evidentiary hearing that neither of them attended Miller's trial. [February 2008 Rule 32 hearing, R. 498, 585.] Trial counsel had specific, strategic reasons for calling and not calling the witnesses they did during the penalty phase and Miller has failed to establish that trial counsel's choices were deficient. Miller has not proved that no reasonably competent attorney would have proceed during the penalty phase in the manner in which Miller's trial counsel did.

"Finally, Miller has failed to demonstrate that his trial counsel were deficient for not retaining and presenting the testimony of a mitigation expert. As noted above, Dr. Scott adequately presented an abundant amount of mitigating evidence. Furthermore, Miller has failed to present any evidence that establishes a reasonably competent attorney practicing at the time of Miller's trial would have retained and presented a mitigation expert. With over twenty-five years of experience litigating criminal cases and participating in several capital murder trials before Miller's, Johnson testified that he had never retained a mitigation expert. [February 2008 Rule 32 Hearing, R. 210, 254.]

Blackwood also testified that in his experience as a criminal defense attorney, he had never hired a mitigation expert. [February 2008 Rule 32 Hearing, R. 868–69.] Accordingly, Miller has failed to establish that his trial counsel were deficient in this regard. Furthermore, Miller has failed to meet his burden of proof of demonstrating that his trial counsel's penalty phase strategy and performance were unreasonable and deficient. Therefore this claim is denied."

(C. 2073–85.)

The circuit court also denied relief on this claim because, the court found, Miller failed to establish that he was prejudiced by his trial counsel's penalty-phase performance. The court stated:

"Even if Miller had demonstrated that his trial counsel were deficient for not presenting sufficient mitigation evidence during the penalty phase, Miller has failed to establish a reasonable probability that the outcome of his proceedings would have been different had such information been presented.

"Miller has failed to establish that he was prejudiced by trial counsel's decision to not retain and present the testimony of a mitigation expert. As noted above, Dr. Scott presented thorough testimony during the penalty phase detailing ***409** Miller's background and family history and also focused much of his testimony on presenting evidence of Miller's mental health problems. [Record on Direct Appeal, R. 1343–91.] Similar to Dr. Scott, Dr. Catherine Boyer testified during the evidentiary hearing in regard to what type of investigation a mitigation expert would conduct. [February 2008 Rule 32 Hearing, R. 592–93.]

"Dr. Boyer also stated that, like Dr. Scott, she met Miller over a period of three occasions. [February 2008 Rule 32 Hearing, R. 598.] However, Dr. Boyer's testimony during the evidentiary hearing covered essentially the same topics and areas which Dr. Scott presented during the penalty phase. Dr. Boyer testified concerning Miller's family history of mental illness, that his family lived in poverty, that Miller had a good employment history, that Ivan was physically abusive, and that Miller had a good relationship with his mother and siblings. [February 2008 Rule 32 Hearing, R. 643–75.] Additional evidence concerning Miller's background and family history provided by Dr. Boyer was simply cumulative of the testimony provided by Dr. Scott during the penalty phase. However, 'unpresented cumulative testimony does not establish that counsel was ineffective.' *McNabb v. State,* 991 So.2d 313, 322 (Ala.Crim.App.2007); *see also Dobyne v. State,* 805 So.2d 733, 755 (Ala.Crim.App.2000) (cumulative evidence would not have affected appellant's sentence). Therefore, this Court finds that Miller was not prejudiced by trial counsel's failure to retain a mitigation expert.

"Similarly, this Court finds that Miller was not prejudiced by his trial counsel's failure to present more details both

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of the extent of physical abuse from his father, Ivan, and of the poverty and unstable environment in which Miller lived. Testimony regarding the extensive level of physical and emotional abuse directed toward Miller as well as the extreme level of poverty of Miller's childhood home was presented during the trial. [Record on Direct Appeal, R. 1349–52.] Miller has failed to present any further significant and specific facts other than cumulative evidence that simply expounds on general examples of Ivan Miller's abuse and the Miller family poverty. Such cumulative testimony does not demonstrate that Miller was prejudiced by the presentation of testimony concerning the level of abuse and poverty in Miller's childhood. *See McNabb,* 991 So.2d at 322, *Dobyne,* 805 So.2d at 755.

"The record indicates that Miller failed to present any further significant evidence of childhood abuse through the testimony of his family members during the evidentiary hearing. His mother, Barbara Miller, generally testified that Ivan ignored Miller, called him names, and physically abused Miller. [February 2008 Rule 32 Hearing, R. 402–11.] However, she did not provide testimony of any specific incidents of abuse or injuries as a result of abuse. Miller's sister, Cheryl Ellison provided minimal testimony regarding Ivan's abuse of Miller, admitting she did not grow up in the same house as Miller. [February 2008 Rule 32 Hearing, R. 501.] Miller's brother Richard also provided nothing but general statements Ivan would '[s]lap [Miller], kick him, sometimes punch him.' [February 2008 Rule 32, R. 546.] Regardless, even if the family could have provided specific facts, simply the fact that Miller's family members could have provided more details of the extent of the abuse Miller suffered or of his childhood poverty does not establish ineffective assistance of counsel. ***410** *See Payne v. Allen,* 539 F.3d 1297, 1317 (11th Cir.2008) ('The mere fact that the family members could have presented more thorough and graphic detail about the physical abuse Payne suffered and witnessed and his early substance abuse does not render counsel's performance ineffective.')

"Moreover, had counsel presented evidence of Miller's childhood poverty and abuse, it would not have altered the balance of mitigation and aggravation under *Strickland.* Miller was in his mid-thirties when he committed the murders. [Record on Direct Appeal, C. 79.] It is well established that evidence concerning a middle aged murderer's childhood poverty, abuse and background would have been entitled to little, if any, mitigating weight. *See Callahan v. Campbell,* 427 F.3d 897, 937–38 (11th Cir.2005) (value of evidence regarding childhood abuse 'minimal' where defendant was thirty-five when he committed crime); *Gilreath v. Head,* 234 F.3d 547, 551 n. 10 (11th Cir.2000) (petitioner not prejudiced when his attorney failed to present evidence concerning his abusive and difficult childhood where petitioner was forty years old when he committed the offense); *Mills v. Singletary,* 63 F.3d 999, 1025 (11th Cir.1995) (petitioner not denied effective assistance of counsel because counsel failed to present evidence concerning abusive childhood where petitioner was twenty-six years old); *Bolender v. Singletary,* 16 F.3d 1547, 1561 (11th Cir.1994) (petitioner twenty-seven years old when committed offense). Accordingly, this Court finds that Miller has failed to establish prejudice under *Strickland.*

"Miller has also failed to establish that he was prejudiced by his trial counsel's decision not to present additional evidence of Miller's positive character through the testimony of his family members during the penalty phase. Trial counsel was not required to present mitigating character evidence at all during the penalty phase. *See Gaddy v. State,* 952 So.2d 1149, 1170–71 (Ala.Crim.App.2006). However, as noted above, trial counsel did present positive evidence of Miller's life through the testimony of Dr. Scott. [Record on Direct Appeal, R. 1349–63.] The testimony of Miller's family members during the evidentiary hearing was simply cumulative of the positive evidence presented by Dr. Scott during the penalty phase.

"Barbara Miller essentially offered no significant, positive details of Miller's character during the evidentiary hearing other than the fact that he helped pay for his younger brother Ivan Ray's funeral expenses and that he cared for his family and was quiet and hard working. [February 2008 Rule 32 Hearing, R. 424.] Miller's uncle, George Carr, provided no noteworthy details of Miller's life and even admitted that he was not around Miller that much as a child. [February 2008 Rule 32 Hearing, R. 462.] Miller's sister, Cheryl Ellison, gave minimal testimony concerning his positive character, only stating that Miler was like a brother to her son, Jake. [February 2008 Rule 32 Hearing, R. 505.] Miller's brother, Richard, essentially did not provide any positive character evidence at all during the evidentiary hearing. The positive character evidence presented through the testimony of Miller's family members during the evidentiary hearing was not significant and was merely cumulative to the positive evidence of Miller's life that

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was presented during the penalty phase. *See McNabb,* 991 So.2d at 322; *Dobyne,* 805 So.2d at 755.

"Miller has also failed to show how he was prejudiced by the failure to present ***411** additional mental health evidence during the penalty phase in the form of Dr. Boyer's diagnosis that Miller suffered from post-traumatic stress disorder. [February 2008 Rule 32 Hearing, R. 714.] Dr. Scott presented testimony that Miller suffered from a mental illness and the trial court found that Miller was under the influence of extreme mental distress and that the capacity to appreciate the criminality of his conduct was substantially impaired. *Miller,* 913 So.2d at 1169. Therefore, the mitigating circumstances pertaining to Miller's mental health were found to exist by the trial court and therefore, the presentation of additional mental health evidence would not have proven any additional statutory mitigating circumstances.

"Furthermore, the evidence presented during the evidentiary hearing casts serious doubt on the opinion of Dr. Boyer that Miller suffered from a post-traumatic stress disorder ('PTSD') at the time of the offense. Dr. Boyer stated that the principle sources of information that led her to conclude that Miller suffered from PTSD were that Miller was exposed to routine abuse, that Miller routinely zoned out, that Miller had certain elevated MMPI [Minnesota Multiphase Personality Inventory] scales, and that Miller had initial difficulty remembering the events of the shootings. [February 2008 Rule 32 Hearing, R. 714–16.]

"On cross-examination, Dr. Boyer agreed that the *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision* (DSM–IV–TR) is an authoritative text in the field of psychiatry, and she explained that the DSM–IV–TR is a guideline for mental health professionals. [February 2008 Rule 32 Hearing, R. 730–31.] Dr. Boyer agreed that a diagnosis of PTSD must have an extreme traumatic stressor as opposed to a generic trauma. [February 2008 Rule 32 Hearing, R. 733.] Specifically, Dr. Boyer noted that with regard to PTSD, the DSM–IV–TR provides, as follows:

> " 'The essential feature of Post Traumatic Stress Disorder is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person.'

"[February 2008 Rule 32 Hearing, R. 733.] With regard to 'traumas' that are experienced directly, Dr. Boyer noted that the DSM–IV–TR provides as follows:

> "Traumatic events that are experienced directly include, but are not limited to, military combat, violent personal assault (sexual assault, physical attack, robbery, mugging), being kidnapped, being taken hostage, terrorist attack, torture, incarceration as a prisoner of war or in a concentration camp, natural or manmade disasters, severe automobile accidents, or being diagnosed with a life-threatening illness.'

"[February 2008 Rule 32 Hearing, R. 733–34.] *See Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision,* at pp. 463–464.

"However, Dr. Boyer noted that Miller had never experienced military combat, a kidnapping, a sexual assault, been taken hostage, been a prisoner of war, or been involved in a terrorist attack, natural disaster or severe automobile accident. [February 2008 Rule 32 Hearing, ***412** R. 734.] Dr. Boyer also noted that Miller had never watched someone be seriously injured or killed, before the shootings took place. [February 2008 Rule 32 Hearing, R. 736.] Dr. Boyer admitted that none of Miller's hospital records indicated that his injuries came from specific incidents of abuse and did not indicate that Miller ever received any serious gunshot or knife wounds. [February 2008 Rule 32 Hearing, R. 740.]

"Dr. Boyer stated that Dr. McClaren did not find that Miller suffered from a dissociative disorder such as PTSD. [First Rule 32 Hearing, R. 744.] Dr. Boyer also noted that no other professional had diagnosed Miller with PTSD. [February 2008 Rule 32 Hearing, R. 750.] In fact, none of the other four doctors who examined Miller in connection with his trial or evidentiary hearing determined that he suffered from PTSD. Dr. Boyer also failed to provide any specific examples from the testimony presented during the evidentiary hearing of Miller re-experiencing bad experiences. [February 2008 Rule 32 Hearing, R. 749–50.]

"Dr. Harry McClaren testified during the evidentiary hearing that there was no evidence to indicate that Miller was reliving anything at the time of the murders. [February 2008 Rule 32 Hearing, R. 787.] Dr. McClaren also stated that he originally was of the opinion that Miller's self-

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report that he had difficulty remembering events of the shootings was of questionable veracity. [February 2008 Rule 32 Hearing, R. 775.] Dr. McClaren later stated that it was unusual for someone with true amnesia to remember certain events in question months later. [February 2008 Rule 32 Hearing, R. 852.] Finally, Dr. McClaren testified that he was of the opinion that Miller was not suffering from PTSD. [February 2008 Rule 32 Hearing, R. 787–88.] The combination of the lack of a previous diagnosis of PTSD from any mental health professional who examined Miller, Dr. McClaren's opinion that Miller does not suffer from PTSD, and the dissimilarity between the examples of traumatic events contained in the DSM–IV–TR associated with PTSD when compared to the facts presented during the evidentiary hearing regarding Miller's life discredits Dr. Boyer's opinion that Miller suffers from PTSD. Regardless, this Court finds that there is no reasonable probability that the presentation of any evidence regarding Miller's alleged diagnosis of PTSD would have altered the jury's recommendation of a death sentence of the trial court's finding that the aggravating circumstances outweigh the mitigating circumstances.

"Finally, in regard to this entire claim, Miller has not shown a reasonable probability that the result of the penalty phase would have been different had additional mitigation evidence been presented based on the brutal nature of the crime, the overwhelming and convincing evidence of guilt, and the strength of the aggravating circumstances that this murder was heinous, atrocious, and cruel. *See Payne,* 539 F.3d at 1318. Miller repeatedly and horrifically shot and killed three people. The Court of Criminal Appeals found that the evidence of guilt was 'overwhelming,' especially in regard to the multiple eyewitnesses identifying Miller as the shooter. *Miller,* 913 So.2d at 1162. In this particular case, there is no reasonable probability that additional mitigation testimony about Miller's background or his mental health problems would have altered the balance of aggravating and mitigating circumstances in this case. *See* ***413** *Payne,* 539 F.3d at 1318 ('Some more detailed mitigating evidence about Payne's childhood, family background, and substance abuse would not have negated the aggravating nature of this abhorrent murder proven beyond all doubt by the State.') Therefore, Miller has failed to establish that he was prejudiced under *Strickland* and accordingly, this claim is denied."

(C. 2085–97.)

[23] [24] [25] The circuit court's findings are supported by the record and law. As the circuit court stated, Miller's claim that his counsel failed to adequately present mitigating evidence is essentially a claim that his counsel should have presented more mitigating evidence. However, as we have stated:

> " 'W]e "must recognize that trial counsel is afforded broad authority in determining what evidence will be offered in mitigation." *State v. Frazier* (1991), 61 Ohio St.3d 247, 255, 574 N.E.2d 483. We also reiterate that post-conviction proceedings were designed to redress denials or infringements of basic constitutional rights and were not intended as an avenue for simply retrying the case. [*Laugesen*] *v. State,* [(1967), 11 Ohio Misc. 10, 227 N.E.2d 663] supra; *State v. Lott,* [(Nov. 3, 1994), Cuyahoga App. Nos. 66388, 66389, 66390], supra. Further, the failure to present evidence which is merely cumulative to that which was presented at trial is, generally speaking, not indicative of ineffective assistance of trial counsel. *State v. Combs* (1994), 100 Ohio App.3d 90, 105, 652 N.E.2d 205.'
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> " *Jells v. Mitchell,* 538 F.3d 478, 489 (6th Cir.2008).
>
> " ' "[C]ounsel is not required to present all mitigation evidence, even if the additional mitigation evidence would not have been incompatible with counsel's strategy. Counsel must be permitted to weed out some arguments to stress others and advocate effectively." *Haliburton v. Sec'y for the Dep't of Corr.,* 342 F.3d 1233, 1243–44 (11th Cir.2003) (quotation marks and citations omitted); see *Herring v. Sec'y, Dep't of Corr.,* 397 F.3d 1338, 1348–50 (11th Cir.2005) (rejecting ineffective assistance claim where defendant's mother was only mitigation witness and counsel did not introduce evidence from hospital records in counsel's possession showing defendant's brain damage and mental retardation or call psychologist who evaluated defendant pre-trial as having dull normal intelligence); *Hubbard v. Haley,* 317 F.3d 1245, 1254 n. 16, 1260 (11th Cir.2003) (stating this Court has "consistently held that there is 'no absolute duty ... to introduce mitigating or character evidence' " and rejecting claim that counsel were ineffective in failing to present hospital records showing defendant was in "borderline mentally retarded range") (brackets omitted) (quoting *Chandler* [*v.*

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United States], 218 F.3d [1305] at 1319 [(11th Cir.2000)]).'

"*Wood v. Allen,* 542 F.3d 1281, 1306 (11th Cir.2008). 'The decision of what mitigating evidence to present during the penalty phase of a capital case is generally a matter of trial strategy.' *Hill v. Mitchell,* 400 F.3d 308, 331 (6th Cir.2005)."

Dunaway v. State, [Ms. CR–06–0996, December 18, 2009] ——So.3d ——, —— (Ala.Crim.App.2009).

[26] **[27]** Additionally,

" 'When claims of ineffective assistance of counsel involve the penalty phase of a capital murder trial the ***414** focus is on "whether 'the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.' " *Jones v. State,* 753 So.2d 1174, 1197 (Ala.Crim.App.1999), quoting *Stevens v. Zant,* 968 F.2d 1076, 1081 (11th Cir.1992). See also *Williams v. State,* 783 So.2d 108 (Ala.Crim.App.2000). An attorney's performance is not per se ineffective for failing to present mitigating evidence at the penalty phase of a capital trial. See *State v. Rizzo,* 266 Conn. 171, 833 A.2d 363 (2003); *Howard v. State,* 853 So.2d 781 (Miss.2003), cert. denied, 540 U.S. 1197 (2004); *Battenfield v. State,* 953 P.2d 1123 (Okla.Crim.App.1998); *Conner v. Anderson,* 259 F.Supp.2d 741 (S.D.Ind.2003); *Smith v. Cockrell,* 311 F.3d 661 (5th Cir.2002); *Duckett v. Mullin,* 306 F.3d 982 (10th Cir.2002), cert. denied, 123 S.Ct. 1911 (2003); *Hayes v. Woodford,* 301 F.3d 1054 (9th Cir.2002); and *Hunt v. Lee,* 291 F.3d 284 (4th Cir.), cert. denied, 537 U.S. 1045 (2002).'

"*Adkins v. State,* 930 So.2d 524, 536 (Ala.Crim.App.2001) (opinion on return to third remand). As we also stated in *McWilliams v. State,* 897 So.2d 437, 453–54 (Ala.Crim.App.2004):

" ' "Prejudicial ineffective assistance of counsel under *Strickland* cannot be established on the general claim that additional witnesses should have been called in mitigation. See *Briley v. Bass,* 750 F.2d 1238, 1248 (4th Cir.1984); see also *Bassette v. Thompson,* 915 F.2d 932, 941 (4th Cir.1990). Rather, the deciding factor is whether additional witnesses would have made any difference in the mitigation phase of the trial." *Smith v. Anderson,* 104 F.Supp.2d 773, 809 (S.D.Ohio 2000), aff'd, 348 F.3d 177 (6th Cir.2003). "There has never been a case where additional witnesses could not have been called." *State v. Tarver,* 629 So.2d 14, 21 (Ala.Crim.App.1993).' "

Hunt v. State, 940 So.2d 1041, 1067–68 (Ala.Crim.App.2005).

On direct appeal, this Court stated:

"With regard to the application of the aggravating circumstance that the murders were especially heinous, atrocious, or cruel, the circuit court made the following findings of fact on remand:

" 'On the morning of August 5, 1999, [Miller] shot and killed three men, namely, Christopher Yancy ("Yancy"), age 28 years; Lee Holdbrooks ("Holdbrooks"), age 32; and Terry Jarvis ("Jarvis"), age 39 years. Yancy and Holdbrooks were both shot at one location and thereafter Jarvis was shot at another location. Each of those victims sustained multiple wounds.

" 'Yancy suffered three wounds to his body. It appears the first shot entered his leg and traveled through his groin and into his spine, paralyzing him. He was unable to move, unable to defend himself and was trying to hide from [Miller] under a desk. Yancy had a cell phone an inch or two from his hand, but because of his paralysis was unable to reach it and call for help. Yancy had to have been afraid his life was about to be taken. Moments elapsed. [Miller] appeared to have then stooped under the desk and have made eye contact with Yancy before shooting him twice more causing his death.

" 'Holdbrooks suffered six wounds to his body. [Miller] shot Holdbrooks several times. Holdbrooks crawled down a hallway for about twenty-five ***415** feet. Holdbrooks was uncertain whether he would live or die as he crawled down the hallway and quite possibly his life was flashing by in his mind. [Miller] took his gun and within two inches of Holdbrooks' head, pulled the trigger for the sixth and final time, the bullet entering Holdbrooks' head causing him to die in a pool of blood.

> " 'Jarvis was shot five times, the last shot being no more than 46 inches away from his body. Before Jarvis was shot, [Miller] had pointed a gun at him in the presence of a witness. [Miller] had accused Jarvis of spreading rumors about him which Jarvis had denied. [Miller] shot Jarvis four times in the chest. [Miller] allowed the witness to leave. No one knows at that point what went through Jarvis' mind. Having denied he spread any rumors, he must have wondered why [Miller] had not believed him and as the witness was allowed to leave that maybe there would be no more shooting and his life would be spared. [Miller] then shot Jarvis through his heart ending Jarvis' life.
>
> " 'It appears all three of [Miller's] victims suffered for a while not only physically, but psychologically. In each instance, there appeared to have been hope for life while they were hurting, only to have their fate sealed by a final shot, execution style.
>
> " 'Based upon the facts presented at this trial, these murders were calculated, premeditated and callous, with utter disregard of human life. The taking of these lives was among the worst in the memory of this Court and was well beyond the level of being especially heinous, atrocious or cruel.'
>
> "....
>
> "... [T]here was sufficient time between the initial gunshot wounds and the final, fatal shots for each of the victims to realize his fate. Given the circumstances, the trial court properly concluded that the murder of the three victims was 'especially heinous, atrocious, or cruel.' See *Ex parte Clark,* 728 So.2d 1126, 1140 (Ala.1998).

Miller, 913 So.2d at 1165–67.

This Court has reviewed the mitigating evidence trial counsel allegedly failed to discover and present against the aggravating circumstances presented and we are confident that there would be no change in the result in this case. See *Wiggins v. Smith,* 539 U.S. at 534.

Accordingly, Miller was due no relief on his claim that his trial counsel were ineffective for not presenting the additional mitigating evidence in the penalty phase of the trial. Thus, it follows that Miller has also failed to prove by a preponderance of the evidence that his appellate counsel were ineffective in the manner in which they presented this claim of ineffective assistance of trial counsel in the post-sentencing proceedings. *Payne,* 791 So.2d at 401.

4.

[28] Miller contends his trial counsel rendered ineffective assistance during his penalty-phase opening statement. (Miller's brief, II(B)(2)(d), at 117–124; Miller's reply brief, at 34–38.) Specifically, Miller argues:

> "Trial counsel made no attempt to outline a coherent mitigation case, to humanize Mr. Miller, or to provide a context for the testimony of Dr. Scott, the only mitigation witness. Instead, Trial Counsel did the opposite: he vilified Mr. Miller, undermined the credibility of Dr. Scott, and effectively conceded the only ***416** aggravating factor on which the State relied."

(Miller's brief, at 117–18.)

The circuit court rejected appellate counsel's assertion in the motion-for-new-trial hearing that Miller's trial counsel "undermined the mitigation case in his opening argument during the penalty phase of the trial." (Circuit court's order denying Miller's motion for new trial, at 17.)

On direct appeal, we affirmed the circuit court's order, stating:

> "Miller contends that trial counsel's opening statement at the penalty phase prejudiced his defense and any mitigating evidence to be presented during the penalty-phase portion of his trial. Specifically, Miller claims that counsel's opening statement undermined the credibility of the only defense witness being offered—Dr. Charles Scott. The end result of counsel's opening statement, Miller claims, suggested to the jury that Miller deserved to be sentenced to death.
>
> "We have reviewed trial counsel's opening statement in its entirety. Consistent with counsel's trial strategy —as testified to during the hearing on Miller's new-trial motion—counsel elected to acknowledge Dr. Scott's

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> conclusion that there was no basis under Alabama law to support an insanity defense in an effort to retain his credibility before the jury and to secure an advisory verdict of life imprisonment without parole, rather than the death sentence. Given the overwhelming evidence of Miller's guilt—including eyewitness testimony identifying Miller as the shooter—counsel had little choice but to acknowledge Miller's guilt. Accordingly, counsel attempted to gain the jury's sympathy by using Dr. Scott's testimony to portray Miller as a 'tortured soul' whose delusions drove him to commit a series of horrific acts. Indeed, our review of counsel's argument reveals it to be an impassioned plea that the jury spare Miller's life."

Miller, 913 So.2d at 1163.

Miller contends that had his appellate counsel properly presented and argued this claim in the motion-for-new-trial proceedings and on appeal, he would have been entitled to relief. In arguing this claim, Miller merely rehashes his argument that his trial counsel rendered ineffective assistance in his opening statement at the penalty phase of the trial. The circuit court thoroughly addressed the rationale behind Miller's trial counsel's opening statement, which "was to convey that no matter what Miller had done, 'whether [the jury] thought he was atrocious or not' and 'whatever their feelings [were] about Mr. Miller' that Miller did not deserve the death penalty." (C. 2068, citing February 2008 Rule 32 Hearing, R. 151, 156.) The circuit court concluded that Miller failed to prove that his trial counsel's strategy was deficient or that he was prejudiced by his counsel's opening statement. (C. 2067–73.) The circuit court's findings are supported by the record.

Accordingly, it follows that Miller has also failed to prove by a preponderance of the evidence that his appellate counsel were ineffective in the manner in which they presented this claim of ineffective assistance of trial counsel in the post-sentencing proceedings. *Payne,* 791 So.2d at 401.

D.

In the fourth part of his argument, Miller presents a number of claims of ineffective assistance of trial counsel that, he contends, his appellate counsel should have presented in the motion-for-new-trial proceedings and on appeal. (Miller's brief, ***417** II(C), at 124–48; Miller's reply brief, at 39.)

1.

[29] Miller maintains that his trial counsel's voir dire examination was inadequate because, he claims, "[t]rial counsel made no effort to determine juror bias or improper influence from the prejudicial media coverage of the case" and "[e]ven when bias was apparent, he failed to strike the juror." (Miller's brief, at 124.) Thus, he alleges that his appellate counsel were ineffective for not pursuing this claim in the post-trial proceedings and on appeal. (Miller's brief, at 124–28.)

The circuit court denied Miller's claim, stating:

> "In paragraphs 158–167 of his amended petition, Miller claims that trial counsel Johnson's voir dire was inadequate. [Amended Rule 32 petition, C. 314–17.] Miller alleges that Johnson did not ask questions related to the jurors exposure to media coverage of the trial and did not effectively ask questions designed to uncover potential bias against Miller.
>
> "This Court denies Miller's claim because he has failed to meet his burden of proof of demonstrating that his trial counsel's performance was deficient under *Strickland,* 466 U.S. at 687. Ala. R.Crim. P., 32.7(d). Because of the extensive publicity in this case, Johnson, along with the District Attorney's office, developed a written questionnaire that was provided to the entire jury panel. [February 2008 Rule 32 Hearing, R. 236.] Within the questionnaire, question # 68 specifically asked the jurors to answer whether they had seen anything about the case in any newspaper. [February 2008 Rule 32 Hearing, R. 237.] Additional questions were included in the questionnaire to determine whether a particular juror had such strong fixed opinions about the case or could not be fair or impartial as a juror. [February 2008 Rule 32 Hearing, R. 238.]
>
> "Johnson testified that he had an opportunity to review the responses to the questionnaires for all members of the jury panel and that he knew the jurors' responses identifying what they saw in the newspapers about the case. [February 2008 Rule 32 Hearing, R. 237–38.] During trial, the trial court and counsel for both parties conducted an extensive individual voir dire of the jury panel. [Direct Appeal, R. 130–763.]
>
> As the record indicates, Johnson strategically conducted voir dire to determine whether any juror had a fixed opinion, for any reason, of the case. Johnson alerted the

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trial court to questions # 68, # 69 and # 70 of the juror questionnaire that pertained to the juror's opinions of the case and implored the trial court to focus its questions on whether the jurors had 'fixed opinions' of the case. [Direct Appeal, R. 146–47.] As a result, the trial court determined that it would examine each juror's response to question # 68 and if the juror indicated they had heard something about the case, the trial court would inquire what the juror heard and whether the juror could set aside what they had heard. [Direct Appeal, R. 148.]

"During the evidentiary hearing, Miller's [Rule 32] counsel questioned Johnson about specific newspaper articles and then questioned Johnson on whether he asked eight jurors about what they had read about the case in the newspaper. [February 2008 Rule 32 Hearing, R. 127–34.] However, as the record indicates, as a result of Johnson's effort, during individual voir dire, the trial court noted each of the eight juror's responses to question # 68 indicating that the juror had seen or read something about the case and then asked ***418** each juror whether they could set what they had learned aside and base their verdict solely on the evidence presented. [Direct Appeal, R. 337–38, 345–46, 376–77, 446–47, 449–50, 625–26, 638–39, 666–67.] All eight jurors indicated that they could set aside what they had learned and sit as a fair and impartial juror. *Id.*

"Therefore, information about the jurors' opinions about the case was brought out during the voir dire and Miller has failed to demonstrate that Johnson's method of conducting voir dire was deficient. Miller has failed to present any evidence that a reasonable attorney would have asked these eight jurors about specific newspaper articles. Furthermore, Miller failed to ask Johnson why he did not strike these eight jurors from the panel, nor did Miller ask any specific question regarding Johnson's strategy for using the defense's peremptory strikes. Therefore, because the record is silent, trial counsel's questioning of the jury panel and the subsequent peremptory strikes is presumed to be reasonable. *See* *Chandler* [*v. United States*], 218 F.3d 1305, 1315 n. 15 [(11th Cir.2000)].

"In paragraph 162 of his amended petition, Miller claims that his trial counsel failed to question and remove Juror [G.J.] who Miller alleges was biased because Juror [G.J.] favored the death penalty. [Amended Rule 32 Petition, C. 315.] However, trial counsel's questioning of Juror [G.J.] was not deficient and the record directly refutes Miller's claim that Juror [G.J.] was biased. Juror [G.J.] stated during voir dire that he could follow the trial court's instructions and listen to the evidence in recommending a sentence in Miller's case. [Direct Appeal, R. 377–78.] Juror [G.J.] also stated that where it was appropriate under the law and evidence he could vote for either life imprisonment or the death penalty. [Direct Appeal, R. 378.] Furthermore, trial counsel Johnson specifically questioned Juror [G.J.] about his views on the death penalty and elicited from Juror [G.J.] that he had no fixed opinions about what an appropriate punishment should be. [Direct Appeal, R. 387–90.] Accordingly, Miller's claim is directly refuted by the record and is denied. *See* *Gaddy v. State,* 952 So.2d 1149, 1161 (Ala.Crim.App.2006).

"....

"This claim is also denied because Miller has utterly failed to meet his burden or proof of demonstrating that he was prejudiced by his trial counsel's performance during voir dire. *See* *Strickland,* 466 U.S. at 695; Ala. R.Crim. P., 32.7(d). Although Miller claims that trial counsel was ineffective for failing to asks eight of the fourteen jurors seated in his case about what they read or remembered about Miller's case, Miller has failed to present any evidence whatsoever about what these eight jurors actually read or remembered about Miller's case prior to trial. [February 2008 Rule 32 Hearing, R. 134.] None of the jurors who sat at Miller's trial testified during the evidentiary hearing. Therefore, no evidence was presented that the eight jurors actually read or were exposed to the newspaper articles introduced into evidence by Miller during the evidentiary hearing. [February 2008 Rule 32 Hearing, R. 127–34, 289–95.] Even if the eight jurors had read these newspaper articles, no evidence was presented that the jurors considered these articles harmful to Miller or that they had fixed opinions about Miller because of these articles.

"There is nothing in the record regarding what the jurors read about Miller's case; accordingly, '[t]he mere fact that some of the jurors that sat for ***419** [Miller's] trial had pretrial knowledge of his case is not enough to establish they were biased against him.' *Duncan v. State,* 925 So.2d 245, 267 (Ala.Crim.App.2005). Therefore, because there is no evidence about what the jurors read and whether they were actually biased against Miller because of what they read, Miller has failed to demonstrate that he was prejudiced by this trial counsel's performance during voir dire. Miller's claim is denied."

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(C. 2039–45.)

The circuit court's findings are supported by the record and Alabama law. As we stated on direct appeal:

> "[T]he potential for actual juror prejudice was addressed through voir dire during the selection of the jury. Through the use of juror questionnaires and individual voir dire, any potential jurors who may have had fixed opinions regarding Miller's guilt were excused from service. Nor was there any showing that media coverage created a presumption of actual prejudice. See *Ex parte Travis,* 776 So.2d 874, 879 (Ala.2000)."

Miller, 913 So.2d at 1162. [9]

Accordingly, "[b]ecause [Miller] failed to establish that his claim of ineffective assistance of trial counsel is meritorious, he has failed to prove by a preponderance of the evidence that his appellate counsel was ineffective for failing to present this claim." *Payne,* 791 So.2d at 401–02.

2.

[30] Miller contends that his appellate counsel should have argued that his trial counsel rendered ineffective assistance in his closing argument at the guilt phase of the trial. (Miller's brief, at 131–33.)

In the circuit court's order denying Miller relief on this claim, the court stated:

> "In paragraphs 209–13 of his amended petition, Miller claims that his trial counsel was ineffective during the guilt phase closing arguments. Miller claims that Johnson conceded guilt and made no attempt to argue that Miller did not have the intent to commit murder. [Amended Rule 32 petition, C. 329–331.] Miller also claims that Johnson was ineffective for stating that he was not 'proud' to represent Miller. [Amended Rule 32 petition, C. 330.]
>
> "This Court denies Miller's claim because he has failed to meet his burden of proof of demonstrating that his trial counsel's performance was deficient under *Strickland,* 466 U.S. at 687. Ala. R.Crim. P., 32.7(d). Johnson's closing argument was reasonable based both on the tactical decision to focus on the penalty phase of trial and his overall strategy of not presenting frivolous arguments in order to win credibility with the jury. [Direct Appeal, R. 1261–64.] As noted above, Johnson continually testified that he strategically chose to focus on the penalty phase of Miller's trial in order to save Miller's life. [Motion for New Trial Hearing, R. 80; February 2008 Rule 32 Hearing, R. 219.] In an attempt to bolster his chances of success during the penalty phase, Johnson made a tactical decision to emphasize to the jury that he would not be presenting frivolous evidence or arguments during the guilt phase. [February 2008 Rule 32 Hearing, R. 143, 219.]
>
> "Similar to his comments during opening statements, Johnson echoed to the jury during closing arguments that he was not going to present a frivolous defense such as arguing a second gunman ***420** existed or challenging the fact that the prosecution could not match the bullets taken from the victims to Miller's gun. [Direct Appeal, R. 1261–62.] Johnson reminded the jury of the State's burden and implored the jury to listen to the judge's instructions on the law and render a verdict based on the facts and consistent with their oath. [Direct Appeal, R. 1263.] Miller has failed to present any evidence which would establish that [Johnson's] continual effort during closing arguments to gain credibility with the jury in order to make an effective penalty phase argument was unreasonable.
>
> "Johnson's decision to not argue that Miller did not have intent to commit capital murder during closing arguments was consistent with his overall trial strategy of focusing on the penalty phase of the trial. [February 2008 Rule 32 Hearing, R. 219.] Moreover, Johnson's comments about his representation of Miller were consistent with this strategy as well. Johnson told the jury that he was proud of his representation of Miller, but in an effort to win favor with the jury, also stated he was still not proud of what happened during the shootings:
>
> " 'And I at least am proud at this point that I have participated in this. It does not remove any degree the shame of what happened. It does not make me proud

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that I'm representing someone who the evidence is fairly convincing, I must concede to you, did what he did.'

"[Direct Appeal, R. 1263–64.] During the evidentiary hearing, Johnson explained that this statement could not be viewed in isolation, but as part of a larger goal of not alienating the jury during the guilt phase to attempt to win favor with the jury. [February 2008 Rule 32 hearing, R. 142–43.]

"When viewed in the context of Johnson's entire trial strategy, Johnson's closing argument was reasonable attempt to gain credibility with the jury during the guilt phase in order to attempt to get a favorable result in the penalty phase—the focus of Johnson's strategy. Based on this approach, Miller has failed to demonstrate that trial counsel's decision was unreasonable or that his performance during closing arguments was deficient under *Strickland.* Therefore, this claim is denied.

"This claim is also denied because Miller failed to meet his burden of proof of demonstrating that he was prejudiced by his trial counsel's closing argument. *See* *Strickland,* 466 U.S. at 695; Ala. R.Crim. P; 32.7(d). Miller has presented no evidence concerning the impact of Johnson's statements on the jury, nor has Miller demonstrated a reasonable probability that the outcome of the guilt phase of his trial would have been different had Johnson not conducted his closing argument in this manner. In general, statements of counsel 'are usually valued by the jury at their true worth and are not expected to become factors in the formation of the verdict.' *Minor,* 914 So.2d at 417. Miller offered nothing more in support of his claim of ineffectiveness than the bare, conclusory allegation that Johnson's closing argument was improper and that it prejudiced the jury, without proving specific facts that demonstrate prejudice. Accordingly, Miller has not met his burden of demonstrating prejudice under *Strickland* and therefore, this claim is denied."

(C. 2060–64.)

The circuit court's findings of fact and conclusions of law are supported by the record. (See this Court's discussion, supra, addressing and rejecting Miller's assertion ***421** that his trial counsel's opening statement at the guilt phase of the trial was ineffective.) Accordingly, "[b]ecause [Miller] failed to establish that his ineffective-assistance-of-trial-counsel claim is meritorious, he has failed to prove by a preponderance of the evidence that his appellate counsel was ineffective for failing to present this claim." *Payne,* 791 So.2d at 401–02.

3.

[31] Miller alleges that his appellate counsel should have argued that his trial counsel were ineffective because trial counsel did not move for a directed verdict "based on the State's failure to present comparative evidence necessary to determine that the killings were 'especially heinous, atrocious, or cruel compared to other capital offenses.' " (Miller's brief, at 139–42.) Miller suggests that because this particular claim was not addressed in the circuit court's order denying the Rule 32 petition, that the court's "silence is a candid admission that trial counsel's failure to make this argument deprived Mr. Miller of the effective assistance of counsel." (Miller's brief, at 142.)

The State maintains that this claim is not properly before this Court because it was not presented in Miller's amended Rule 32 petition, and the State asserts " '[Miller] cannot raise an issue on appeal from the denial of a Rule 32 petition which was not raised in the Rule 32 petition.' " (State's brief, at 140, quoting *Arrington v. State,* 716 So.2d 237, 239 (Ala.Crim.App.1997).) We agree that this claim was not properly presented to the circuit court and, thus, is not properly before this Court for appellate review.

Although Miller raised numerous grounds of ineffective assistance of trial counsel in his amended Rule 32 petition, as best we can determine, Miller did not present a claim that his trial counsel were ineffective because trial counsel did not move for a directed verdict on the ground the State failed to present comparative evidence for the jury to consider in determining whether the aggravating circumstance that the offense was especially heinous, atrocious, or cruel when compared to other capital cases had been proven. During the Rule 32 evidentiary hearing, the following exchange occurred between Miller's Rule 32 counsel and Miller's trial counsel, Mickey Johnson:

"Q. Now, at the conclusion of the penalty phase, Mr. Johnson, you moved for a directed verdict and I believe that you stated on the record that the ground was that the State failed to prove an aggravating statutory circumstance. Do you recall making that motion?

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"A. I don't recall it but, here again, I don't dispute the record.

"Q. ... But you didn't explain the basis for that motion to Judge Crowson, did you?

"A. I don't know.

"....

"Q. We have discussed earlier that the sole aggravating factor in this case the State was relying upon was that the capital offense was especially heinous, atrocious or cruel compared to other capital offenses; is that correct?

"....

"A. That's the way I recall it, yes.

"....

"Q. So the State didn't present the jury, which was going to be making this recommendation on the death penalty, with any information that would have permitted the jury to compare the level of heinousness, atrociousness or cruelty of this crime to other capital offenses, isn't that correct?

"A. I don't recall any efforts being made by the State in that regard, no.

***422** "Q. And I am correct you did not argue to Judge Crowson that the failure of the State to present such compared evidence meant that the State had failed to prove this aggravating factor as a matter of law? The record contains no such argument. *I just want to confirm that.*

"A. I would aver to the record."

(February 2008 Rule 32 Hearing, R. 193–94.)

Given the amount of testimony and evidence presented at the Rule 32 hearings, the variety of issues addressed in the hearing, the often random manner in which the claims were addressed, and the convoluted nature of this claim and the fact that it was not presented as a specific claim in the amended Rule 32 petition, we do not consider Rule 32 counsel's "confirmation" that trial counsel did not "argue" this ground for a directed verdict to be sufficient to alert the circuit court to the very specific allegation that Miller now presents on appeal. In other words, Rule 32 counsel did not sufficiently present a "material issue of fact" in the Rule 32 hearing that required a finding of fact by the circuit court. See Rule 32.9(d), Ala. R.Crim. P. Therefore, contrary to Miller's suggestion, we will not interpret from the fact that this claim was not addressed in the circuit court's order to mean that the circuit court conceded the claim Miller now presents on appeal.

Even so, Miller is entitled to no relief because his underlying claim is without merit. The gist of Miller's argument is the circuit court's instructions regarding the aggravating circumstance that the offense was especially heinous, atrocious, or cruel when compared to other capital offenses obligated the jury to consider the facts of other capital cases in order to determine whether the State met its burden of proof. He contends that because the State did not present facts from other capital cases for comparison purposes, the State did not prove the sole aggravating circumstance that the offense in this case was especially heinous, atrocious, or cruel when compared to other capital cases. Thus, Miller argues, he was entitled to a directed verdict imposing a sentence of life imprisonment without the possibility of parole. Miller concludes that because his trial counsel failed to move for a directed verdict on this ground, he was sentenced to death.

In support of his argument, Miller cites the following portion of the circuit court's instructions to the jury:

"What is intended to be included in this aggravating circumstance is those where the actual commission of the capital offense is accompanied by such additional acts as to *set the crime apart from the norm of capital offenses.*

"For a capital offense to be especially cruel, it must be a conscienceless or pitiless crime which is unnecessary torturous to the victim. All capital offenses are heinous, atrocious and cruel to some extent. What is intended to be covered by this aggravating circumstance is only *those cases in which the degree of heinous, atrociousness or cruelty exceeds that which will always exist when a capital offense is committed.*"

(Miller's brief, at 140, citing record on direct appeal, R. 1432–33)(emphasis in Miller's brief).

The Alabama Supreme Court has stated:

"Bankhead suggests that the jury should have had the opportunity to compare the capital offense in this case with other capital offenses for purposes of § 13A–5–49(8) [, Ala.Code 1975].

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> "Although a very narrow and literal reading of the statute may suggest that such a comparison is required, it would be virtually impossible for the court to ***423** implement. Charging the jury on pertinent facts of 'other capital cases' would unduly burden the court. It would be unworkable for the court and would thoroughly confuse the jury.
>
> "This Court has decided upon an approach for the purposes of § 13A–5–49(8). In comparing capital offenses for the purposes of determining whether a capital offense was 'especially heinous, atrocious or cruel,' the court uses the [*Ex parte*] *Kyzer* [, 399 So.2d 330 (Ala.1981),] standard. Capital offenses falling under § 13A–5–49(8) are, pursuant to the *Kyzer* standard, those 'conscienceless or pitiless homicides which are unnecessarily torturous to the victim.' *Kyzer,* 399 So.2d at 334. The trial court clearly followed the *Kyzer* standard in its instructions to the jury."

Ex parte Bankhead, 585 So.2d 112, 125 (Ala.1991), aff'd on return to remand, 625 So.2d 1141 (Ala.Crim.App.1992), rev'd on other grounds, 625 So.2d 1146 (Ala.1993).

[32] The State was not required to present pertinent facts from other capital cases for comparison purposes in order to sustain its burden of proving that the offense was especially heinous, atrocious, or cruel when compared to other capital offenses. Contrary to Miller's interpretation, the circuit court's charge did not obligate the jury to consider other capital offenses for comparison purposes when determining if the State met its burden of proof. Rather, the circuit court's charge followed the standard set out in *Ex parte Kyzer,* 399 So.2d 330 (Ala.1981). (Record on Direct Appeal, R. 1432–35.) Furthermore, this Court affirmed the circuit court's finding that the murders were especially heinous, atrocious, or cruel. See *Miller,* 913 So.2d at 1165–67. Thus, Miller's counsel would not have been entitled to a directed verdict on the ground that the State did not sustain its burden of proof because it did not present facts from other cases for comparison purposes.

Accordingly, because Miller failed to prove that his underlying claim had merit, he also failed to prove that his trial counsel were ineffective for not moving for a directed verdict on this ground. Therefore, "[b]ecause [Miller] failed to establish that his ineffective-assistance-of-trial-counsel claim is meritorious, he has failed to prove by a preponderance of the evidence that his appellate counsel was ineffective for failing to present this claim." *Payne,* 791 So.2d at 401–02.

4.

[33] Miller contends that his appellate counsel should have argued that trial counsel rendered ineffective assistance at the sentencing hearing. (Miller's brief, at 144–146.) Miller argues that the presentence investigative report prepared by the Alabama Board of Pardons and Paroles "woefully understated the abuse [he] suffered from his father." (Miller's brief, at 144.) Miller states that his trial counsel reviewed the presentencing report, but that counsel did not present any additional evidence for the circuit court's consideration. He alleges that had his trial counsel presented the additional mitigating evidence discussed elsewhere in this opinion, there is a "reasonable probability that the trial judge would not have sentenced [him] to death." (Miller's brief, at 145.)

In denying relief on this argument, the circuit court stated:

> "In paragraphs 277–79 of his amended petition, Miller claims that trial counsel were ineffective for failing to offer any additional evidence or witnesses in support of Miller. [Amended Rule 32 Petition, C. 350–51.]
>
> "The Court denies Miller's claim because he has failed to meet his burden of proof of demonstrating that his trial ***424** counsels' performance was deficient under *Strickland,* 466 U.S. at 687. Ala. R.Crim. P., 32.7(d). Alabama courts have held that 'counsel does not necessarily render ineffective assistance simply because he does not present all possible mitigating evidence.' *McGahee v. State,* 885 So.2d 191, 221 (Ala.Crim.App.2003). However, as noted above, trial counsel presented a competent mitigating case concerning Miller's mental health and background during the penalty phase of the trial. The trial court presided over Miller's trial and heard all of the mitigating evidence presented. Simply the fact that Miller's trial counsel could have presented more mitigation evidence during the sentencing hearing does not establish deficient performance under *Strickland, See McGahee,* 885 So.2d at 221 ('Trial counsel could have called more witnesses at the penalty-phase hearing before the trial judge, with the hope that

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the additional information would have convinced the trial judge to agree with the jury's recommendation and to sentence McGahee to life imprisonment without parole. The same can be said after *any* sentencing hearing in a capital case in which a death sentence is imposed after the jury recommended a sentence of life imprisonment without parole.' (emphasis in original)).

"Miller failed to ask trial counsel any questions regarding the reasons why he did not call any witnesses or present evidence during the sentencing hearing. [February 2008 Rule 32 Hearing, R. 200–01.] Therefore, trial counsel's performance must be presumed to be reasonable. Furthermore, Miller's trial counsel could not be ineffective for failing to present additional mitigation evidence during the sentencing hearing because 'Section 13A–5–47, Ala.Code 1975, does not provide for the presentation of additional mitigation evidence at sentencing by the trial court.' *Boyd v. State,* 746 So.2d 364, 398 (Ala.Crim.App.1999). Therefore, Miller has failed to establish that his trial counsels' performance was deficient and this claim is denied.

"This claim is also denied because Miller has failed to meet his burden of proof of demonstrating that he was prejudiced. *See* *Strickland,* 466 U.S. at 695; Ala. R.Crim. P., 32.7(d). Miller failed to establish what additional evidence could have been submitted during the sentencing hearing. Miller asked trial counsel whether he submitted Dr. Scott or Dr. McDermott's report during the sentencing hearing before the trial court; however, the substance of both reports had already [been] presented during the penalty phase. Furthermore, the trial court found three statutory mitigating circumstances to exist. *Miller,* 913 So.2d at 1169. Miller has failed to demonstrate what additional mitigating circumstances could have been proven during the sentencing hearing. Accordingly, Miller has failed to establish proof that he was prejudiced and this claim is denied."

(C. 2103–05.)

The circuit court's findings of fact and conclusions of law are supported by the evidence. Accordingly, "[b]ecause [Miller] failed to establish that his ineffective-assistance-of-trial-counsel claim is meritorious, he has failed to prove by a preponderance of the evidence that his appellate counsel was ineffective for failing to present this claim." *Payne,* 791 So.2d at 401–02. [10]

***425** Miller also asserts that his appellate counsel should have argued that his trial counsel were ineffective for not apprising the trial court of the United States Supreme Court's decision in *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). (Miller's brief, at 146–48.) This assertion was neither presented in Miller's amended Rule 32 petition, nor was it addressed in the evidentiary hearing. Accordingly, this claim in not properly before this Court. *Arrington v. State,* 716 So.2d 237, 239 (Ala.Crim.App.1997).

5.

Miller presents several other claims of ineffective assistance of trial counsel that he alleges his appellate counsel should have presented in the post-sentencing proceedings; however, the circuit court determined that Miller abandoned the underlying claims of ineffective assistance of trial counsel because he did not pursue the claims in the evidentiary hearing and/or he did not pose questions or elicit evidence to support his claims. See *Brooks v. State,* 929 So.2d 491, 497 (Ala.Crim.App.2005) ("We have held that a petitioner is deemed to have abandoned a claim if he fails to present any evidence to support the claim at the evidentiary hearing."); *Chandler v. United States,* 218 F.3d at 1314 n. 15 ("An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption [of effective representation.]"); *Payne,* 791 So.2d at 399 ("Because it appears that Payne did not present evidence at the evidentiary hearing with regard to [Payne's claims], we will conclude that he has abandoned these claims and we will not review them.").

Specifically, the circuit court found that Miller abandoned the following underlying claims of ineffective assistance of trial counsel:

a. "Trial counsel was ineffective in cross-examining prosecution witnesses." (Miller's brief, at 129–31)(C. 2059–69);

b. "Trial counsel ineffectively failed to request guilt-phase jury instructions." (Miller's brief, at 134–35) (C. 2066–67);

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c. "Trial counsel was ineffective in his penalty-phase closing argument." (Miller's brief, at 135–39) (C. 2098–2100);

d. "Trial counsel failed to request a special penalty-phase verdict form that was necessary to protect Mr. Miller's rights." (Miller's brief, at 142–44)(C. 2100–11).

Miller does not dispute the circuit court's conclusion that he abandoned these claims. Accordingly, because Miller failed to prove his underlying allegations of ineffective assistance of trial counsel had merit, he has also failed to prove that his appellate counsel were ineffective for not presenting these claims in the post-sentencing proceedings. *Payne,* 791 So.2d at 401–02.

***426** Last, we note that to the extent that Miller asserts he is entitled to relief because of the "cumulative effect of error" of his trial counsel and/or appellate counsel, Miller is due no relief. As discussed above, Miller failed to establish any one instance of ineffective assistance of trial/appellate counsel, let alone cumulative error. See *Ex parte Woods,* 789 So.2d 941, 943 n. 1 (Ala.2001) ("A correct statement of the law would be that, when no one instance amounts to error at all (as distinguished from error not sufficiently prejudicial to be reversible), the cumulative effect cannot warrant reversal. In other words, multiple nonerrors obviously do not require reversal."). *McNabb v. State,* 991 So.2d 313, 333 (Ala.Crim.App.2007), cert. denied, 991 So.2d 336 (Ala.2008).

For the reasons set forth above, the judgment of the circuit court is affirmed.

AFFIRMED.

WELCH, P.J., and WINDOM and BURKE, JJ., concur. JOINER, J., recuses himself.

All Citations

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Footnotes

1 Mickey Johnson's first cocounsel, Roger Bass, who withdrew during the pretrial phase, died in 2002. (R. 29.)

2 This Court initially remanded Miller's case to the circuit court for that court to enter specific written findings of fact regarding each of the claims Miller raised in the hearing on the motion for a new trial and to enter specific written findings of fact regarding the existence of the aggravating circumstance that the capital murder was especially heinous, atrocious, or cruel, when compared to other offenses. *Miller,* 913 So.2d at 1153.

3 According to the testimony elicited at the Rule 32 hearing, the trial transcript was completed on October 20, 2000, and appellate counsel began reviewing the transcript on November 2, 2000. (August 2008 Rule 32 Evidentiary Hearing, R. 23.)

4 Miller's Rule 32 counsel requested that the State produce the recording of the interrogation. The State contacted the Pelham Police Department, the agency that retained the evidence in this case, and requested a copy of the tape. The State told the court hearing the Rule 32 petition that there was no record that the referenced tape ever existed. The State informed the court that it had provided all existing tapes within the district attorney's files to Miller, and Miller does not dispute that. (February 2008 Rule 32 hearing, R. 529–30.)

5 The State argues that this particular assertion is not properly before this Court because it was not presented in the amended Rule 32 petition; however, this contention was addressed in the Rule 32 evidentiary hearing. (Rule 32 Hearing, R. 94.)

6 The record from the direct appeal indicates that a veniremember informed the court that he had overheard other veniremembers express that the trial was a waste of time because the facts were "cut and dried." The veniremember could not identify who made the statements. Johnson moved to quash the venire. The circuit court denied Johnson's motion to quash the venire; however, the veniremember who told the court what he had overheard was excused from service. (Direct Appeal, R. 691–97.)

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7 "The ABA Guidelines were revised in 2003—after [Miller] was tried and convicted in [2000.] 'After *Wiggins [v. Smith,* 539 U.S. 510 (2003)], these Guidelines have been revised to be even more exacting insofar as they require counsel "to seek information that ... rebuts the prosecution's case in aggravation," ... and to "determine at the earliest possible time what aggravating factors the prosecution will rely upon in seeking the death penalty and what evidence will be offered in support thereof." ' *United States v. Karake,* 370 F.Supp.2d 275, 278 (D.D.C.2005). '[W]e recognize that we must measure counsel's performance in this case against the prevailing standards at the time of [Miller's] trial.' *Hamblin v. Mitchell,* 354 F.3d 482, 487–88 (6th Cir.2003)." *Ray,* 80 So.3d at 982 n. 5.

8 At another place in his amended Rule 32 petition, Miller did make the bare assertion that his trial counsel failed to collect and evaluate Miller's employment, educational, medical records, and his family's medical records. (C. 275.)

9 In the quoted portion of our opinion on direct appeal, this Court was addressing Miller's allegation that his trial counsel was ineffective for not moving for a change of venue.

10 To the extent that Miller is attempting to assert a claim that his trial counsel were ineffective for not objecting to the purported inadequacy of the presentence report, this assertion is not properly before this Court. Miller neither presented this as a claim in his amended Rule 32 petition nor specifically argued this as a ground for relief during the Rule 32 evidentiary hearing. As we have stated earlier in this opinion, the rules of preservation apply in Rule 32 proceedings, even if the death penalty is involved. Thus, even if the presentence report was "woefully inadequate," which it is not, Miller would be due no relief as he failed to argue this ground to the circuit court. *Cf. Ex parte Washington,* [Ms. 1071607, April 15, 2011] —— So.3d —— (Ala.2011) (Supreme Court implied in dicta that a presentence report, to which Washington objected, was inadequate because the report contained almost no information about Washington's troubled upbringing or its effect on him, nor did the report contain sufficient information about Washington's mental-health problems).

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913 So.2d 1148
Court of Criminal Appeals of Alabama.

Alan Eugene MILLER
v.
STATE of Alabama.

CR-99-2282.
|
Jan. 6, 2004.
|
On Return to Remand
Oct. 29, 2004.
|
Rehearing Denied Jan. 7, 2005.
|
Certiorari Denied May 27, 2005
Alabama Supreme Court 1040564.

Synopsis

Background: Defendant was convicted in a jury trial in the Circuit Court, Shelby County, No. CC-99-792, D. Al Crowson, J., of capital murder and was sentenced to death. Defendant appealed. The Court of Criminal Appeals remanded so that circuit court could correct sentencing order and make specific findings of fact.

Holdings: On return to remand, the Court of Criminal Appeals, Wise, J., held that:

[1] evidence supported finding that defendant committed intentional murder;

[2] defendant failed to establish ineffective assistance of counsel during guilt phase;

[3] defendant failed to establish ineffective assistance of counsel during penalty phase;

[4] victim impact testimony was relevant and admissible during penalty phase;

[5] evidence supported finding of death penalty aggravator that murder was especially heinous, atrocious, or cruel; and

[6] imposition of death sentence was proper.

Affirmed.

West Headnotes (24)

[1] **Criminal Law** Necessity of Objections in General

Plain-error doctrine applies only if the error is particularly egregious and if it seriously affects the fairness, integrity, or public reputation of judicial proceedings.

[2] **Sentencing and Punishment** Presentation and Reservation in Lower Court of Grounds of Review

Although defendant's failure to object at trial did not preclude Court of Criminal Appeals from reviewing issue on direct appeal of capital murder conviction and death sentence, the failure weighed against any claim of prejudice.

[3] **Criminal Law** Inferences from Evidence

Criminal Law Inferences or Hypotheses from Evidence

When there is legal evidence from which the jury could, by fair inference, find defendant guilty, the trial court should submit the case to the jury, and, in such a case, appellate court will not disturb the trial court's decision.

[4] **Homicide** Intent or Mens Rea

Question whether a defendant intentionally caused the death of another person is a question of fact for the jury.

[5] **Homicide** Intent or Mens Rea

Evidence supported finding that defendant intended to kill victims, thus supporting convictions for intentional murder; witness testimony and forensic evidence showed that

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defendant intentionally drew his pistol and shot three victims multiple times.

[6] **Criminal Law** Affidavits and Other Proofs in General

At a hearing on a motion for new trial, defendant has the burden of proving the allegations of his motion to the satisfaction of the trial court.

[7] **Criminal Law** Motion for New Trial

Criminal Law New Trial and Arrest of Judgment

Trial court's ruling on a motion for a new trial is presumed to be correct and will be upheld on appeal unless found to be clearly erroneous.

[8] **Criminal Law** Standard of Effective Assistance in General

Defendant is not entitled to an error-free trial, and the fact that trial counsel made a mistake is not enough to show that counsel's performance was ineffective. U.S.C.A. Const.Amend. 6.

[9] **Criminal Law** Introduction of and Objections to Evidence at Trial

Fact that trial counsel did not object at every possible instance does not mean that a defendant's counsel was incompetent. U.S.C.A. Const.Amend. 6.

[10] **Criminal Law** Raising of Particular Defense or Contention

Criminal Law Raising Issues on Appeal; Briefs

Attorney is not required to raise every conceivable claim available at trial or on appeal in order to render effective assistance. U.S.C.A. Const.Amend. 6.

[11] **Criminal Law** Determination

Appellate court should avoid using "hindsight" to evaluate effectiveness of defense counsel's trial performance; instead, appellate court must consider the circumstances surrounding the case at the time of counsel's actions before determining whether counsel's assistance was ineffective. U.S.C.A. Const.Amend. 6.

1 Cases that cite this headnote

[12] **Criminal Law** Capacity to Commit Crime; Insanity or Intoxication

Criminal Law Introduction of and Objections to Evidence at Trial

Defense counsel's failure to put on insanity defense or present evidence during guilt phase of capital murder trial did not constitute ineffective assistance of counsel; counsel's decisions were made after thorough investigation of defendant's case, and counsel's focus was to maintain credibility with jury in order to spare defendant's life at penalty phase of trial. U.S.C.A. Const.Amend. 6.

[13] **Criminal Law** Strategy and Tactics in General

Strategic choices made after a thorough investigation of relevant law and facts are virtually unchallengeable in claim of ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

[14] **Criminal Law** Standard of Effective Assistance in General

Mere difference of opinion between a defendant and his trial counsel is insufficient to render counsel's performance ineffective. U.S.C.A. Const.Amend. 6.

2 Cases that cite this headnote

[15] **Homicide** Mere Language, or Words Alone

Homicide Insulting or Defaming Defendant

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Fact that a victim may have spread rumors about the defendant or "smarted off" to a defendant is insufficient to mitigate an intentional killing under any doctrine of provocation or heat of passion.

[16] **Criminal Law** Particular Offenses

Capital murder defendant failed to establish that he was entitled to change of venue due to high profile nature of case; potential for actual juror prejudice was addressed through voir dire during the selection of the jury, and there was no showing that media coverage created a presumption of actual prejudice.

[17] **Criminal Law** Argument and Comments

Defense counsel's opening statement in penalty phase of capital murder prosecution did not constitute deficient assistance of counsel; counsel's acknowledgment that there was insufficient evidence to support insanity defense was designed to retain credibility with jury and to secure an advisory verdict of life imprisonment without parole through plea to jury's sympathy. U.S.C.A. Const.Amend. 6.

[18] **Criminal Law** Presentation of Evidence in Sentencing Phase

Defendant failed to establish that trial counsel provided deficient assistance during penalty phase of capital murder trial; counsel's focus was to maintain credibility with jury in order to spare defendant's life, counsel explained reasons for presenting evidence regarding defendant's family and social history through expert witness's testimony rather than through various family members, and defendant offered no additional mitigating evidence that counsel did not discover or that counsel failed to consider in formulating strategy. U.S.C.A. Const.Amend. 6.

[19] **Sentencing and Punishment** Mode of Execution

Execution by electrocution does not violate Eighth Amendment's prohibition on cruel and unusual punishment. U.S.C.A. Const.Amend. 8.

[20] **Sentencing and Punishment** Victim Impact

"Victim impact" testimony in penalty phase of capital murder trial, used to offer jury a glimpse into lives taken by defendant, was relevant to determination of appropriate punishment.

5 Cases that cite this headnote

[21] **Sentencing and Punishment** Vileness, Heinousness, or Atrocity

For aggravating circumstance for capital offenses that are "especially heinous, atrocious, or cruel" to apply, the particular offense must be one of those conscienceless or pitiless homicides which are unnecessarily torturous to the victim. Code 1975, § 13A-5-49(8).

4 Cases that cite this headnote

[22] **Sentencing and Punishment** Vileness, Heinousness, or Atrocity

Evidence supported finding that defendant's capital offense was "especially heinous, atrocious, or cruel," thus supporting application of aggravating circumstance; there was sufficient time between the initial gunshot wounds and the final, fatal shots for each of defendant's victims to realize his fate. Code 1975, § 13A-5-49(8).

3 Cases that cite this headnote

[23] **Jury** Death Penalty

Sentencing and Punishment Unanimity

Capital defendant's death sentence complied with requirement that jury determine any facts upon which an increase in his maximum punishment was conditioned; jury was instructed on aggravating circumstance that offense was "especially heinous, atrocious, or cruel," and jury's 10-2 vote recommending death established that jury unanimously found the existence of

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aggravating circumstance. Code 1975, §§ 13A-5-46(e)(1-3), 13A-5-49(8).

5 Cases that cite this headnote

[24] **Sentencing and Punishment** More Than One Killing in Same Transaction or Scheme

Sentencing and Punishment Vileness, Heinousness, or Atrocity

Death sentence was appropriate for capital defendant convicted of the murder of two or more people by one act or pursuant to one scheme or course of conduct; court found aggravating circumstance that murders were especially heinous, atrocious, or cruel, and trial court found that aggravating circumstance outweighed three mitigating circumstances. Code 1975, §§ 13A-5-40(a)(10), 13A-5-49(8), 13A-5-53.

9 Cases that cite this headnote

Attorneys and Law Firms

***1150** William R. Hill, Jr., and J. Haran Lowe, Jr., Clanton, for appellant.

***1151** William H. Pryor, Jr., atty. gen., and Tracy Daniel and Andy Scott Poole, asst. attys. gen., for appellee.

Opinion

WISE, Judge.

The appellant, Alan Eugene Miller, was convicted of capital murder in connection with the deaths of Lee Michael Holdbrooks, Christopher S. Yancy, and Terry Lee Jarvis. The murders were made capital because they were committed "by one act or pursuant to one scheme or course of conduct." See § 13A-5-40(a)(10), Ala.Code 1975. After a sentencing hearing, the jury recommended, by a vote of 10-2, that Miller be sentenced to death. The trial court accepted the jury's recommendation and sentenced Miller to death by electrocution.

Miller raises a number of issues for this Court's review. However, our initial review of the record reveals that we must remand this case for additional action by the circuit court so that we may adequately address the merits of several of Miller's claims.

I.

On June 17, 2000, the jury returned an advisory verdict recommending that Miller be sentenced to death. Thereafter, on July 31, 2000, the circuit court accepted the jury's recommendation and orally sentenced Miller to death by electrocution. However, the Court advised the parties that as soon as it could it would enter written findings, as required by Alabama law.

At the conclusion of the sentencing hearing, Miller's trial counsel requested that the court appoint other counsel to represent Miller on appeal, stating, "the reason being that I need to be scrutinized as well as the facts in this case." (R. 1473.) The court granted trial counsel's request, and it appointed new counsel to represent Miller on appeal. On August 1, 2000, Miller's newly appointed appellate counsel filed a motion for a new trial on the ground that the verdict was "contrary to law and the weight of the evidence."

On August 24, 2000, the circuit court entered its written order sentencing Miller to death by electrocution. The following day, Miller's appellate counsel filed an amendment to Miller's previous motion for a new trial. Included in the amended new-trial motion was a claim that Miller's trial counsel was ineffective. The circuit court held an evidentiary hearing on the motion. At the evidentiary hearing, Miller's new attorneys focused on two issues: (1) the competency of Miller's trial counsel; and (2) Miller's mental condition at the time the murders were committed. Miller's trial counsel testified at length concerning his representation of Miller. New counsel also presented testimony from two mental health professionals regarding Miller's mental state at the time of the murders. Following the evidentiary hearing, the parties were given the opportunity to brief the issues raised during the hearing. On February 21, 2001, the circuit court summarily denied Miller's motion for a new trial. The court entered no written order and made no specific findings of fact as to the evidence presented during the evidentiary hearing. The case action summary merely indicated that Miller's new-trial motion was being denied.

Because the circuit court summarily denied Miller's motion for a new trial without making specific, written findings of

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fact, despite holding a hearing and receiving evidence and briefs regarding the claims asserted in the motion, we must remand this case to the trial court for it to make specific written findings of fact regarding each of the claims Miller raised during the hearing on his motion for a new trial. The circuit court's failure to make such findings ***1152** hampers this Court's ability to fulfill its statutory mandate as set out in § 13A-5-53, Ala.Code 1975. "Because the trial court presided over the trial and the hearing on the motion for a new trial, we believe that that court is in the best position to make findings of fact regarding the appellant's claims." *Tubbs v. State,* 753 So.2d 1209, 1210 (Ala.Crim.App.1999); see also *Davis v. State,* 826 So.2d 894, 896 (Ala.Crim.App.2000); *Stallings v. State,* 793 So.2d 867, 869 (Ala.Crim.App.2000).

II.

Miller argues that the circuit court erred in determining that the facts of this case warranted a finding that the offense was especially heinous, atrocious, or cruel when compared to other capital offenses. Specifically, Miller challenges the constitutionality of this aggravating circumstance, on the ground that this aggravating circumstance is "impermissibly vague and overly broad." He further argues that "[s]uch a standard has become meaningless in recent years precisely because the State has chosen to use this as a catchall and effectively made every murder worthy of capital punishment."

Before we can address the merits of Miller's claim, however, we must remand this case for the circuit court to make specific findings of fact regarding its finding that the murders committed by Miller were especially heinous, atrocious, or cruel, when compared to other offenses.

When considering whether a particular capital offense was "especially heinous, atrocious or cruel," this Court adheres to the standard set out in *Ex parte Kyzer,* 399 So.2d 330, 334 (Ala.1981), namely, that the particular offense must be one of those "conscienceless or pitiless homicides which are unnecessarily torturous to the victim."

Here, the circuit court found that the murders were especially heinous, atrocious, or cruel as compared to other capital murders. The court, in its sentencing order, stated merely:

> "The Court finds the conduct of the Defendant constituted an intentional killing of two or more persons pursuant to one scheme or course of conduct [and] that this capital murder offense committed by the Defendant was especially heinous, atrocious or cruel compared to other capital murder offenses."

The court's order fails to comply with *Ex parte Kyzer,* because the trial court failed to make specific findings of fact as to why it believed that this aggravating circumstance existed. Although the circuit court made findings of fact in another part of its three-part sentencing order, those facts do not establish specific findings addressing the standard set forth in *Ex parte Kyzer.* See, e.g., *Stallworth v. State,* 868 So.2d 1128, 1168 (Ala.Crim.App.2001).

This Court has approved the application of this aggravating circumstance when the testimony has established that the victims were stabbed multiple times and that they suffered before they died. See *Price v. State,* 725 So.2d at 1062; *Barbour v. State,* 673 So.2d 461, 471 (Ala.Crim.App.1994), aff'd, 673 So.2d 473 (Ala.1995), cert. denied, 518 U.S. 1020, 116 S.Ct. 2556, 135 L.Ed.2d 1074 (1996); *Hallford v. State,* 548 So.2d 526, 546 (Ala.Crim.App.1988), aff'd, 548 So.2d 547 (Ala.1989), cert. denied, 493 U.S. 945, 110 S.Ct. 354, 107 L.Ed.2d 342 (1989). However, when a circuit court has found this aggravating circumstance to exist, this Court has required the court to make specific findings of fact explaining why this aggravating circumstance was applicable. We quote the circuit court's sentencing order in *Barbour,* where the court stated:

> " 'The Court does find that Roberts did suffer before she was killed, because ***1153** she was savagely beaten by Barbour, Mitchell and Hester into a stupefied state or into a state of unconsciousness. In any event, she was rendered helpless. What Roberts's thoughts were during this attack, we will never know. However, common sense dictates that when attacked by three relative strangers, one must be fearful of their ultimate fate. Thus, Roberts suffered psychologically. In addition, the blows were surely painful.

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> " 'The Court finds that based on a consideration of all the circumstances from the moment the attack began until Barbour, Mitchell and Hester left Roberts's home, the State has proved beyond a reasonable doubt that the capital offense was heinous, atrocious, or cruel. This legal conclusion is based on an amalgam of the case law on this subject....
>
> " '*A summary of the facts is appropriate. Roberts was beaten into a helpless state. She was then raped by Hester as she lay helpless. Barbour concluded that she must die because she knew who her attackers were, and he stabbed her nine times with such force that two of the blows penetrated Roberts'[s] back. Barbour left the murder weapon protruding from Roberts'[s] chest. Barbour then set a fire or fires in an attempt to hide the criminal act. The fires resulted in some mutilation of Roberts's body.*' "

673 So.2d at 471 (emphasis in *Barbour*).

We do not wish to question the existence of this aggravating circumstance. However, given that the circuit court found only one aggravating circumstance to exist-that this offense was "especially heinous, atrocious or cruel compared to other capital offenses"-we must remand this case to the circuit court for specific findings of fact as to why the court found that the murders were "especially heinous, atrocious or cruel" when compared with other capital murders.

For the reasons stated in Part I of this opinion, we remand this case for the circuit court to make specific written findings of fact as to the claims that Miller raised during the hearing on his motion for a new trial. In addition to the findings of fact, the circuit court shall include in its return to remand any documentary evidence it considered in making these findings, including, but not limited to, the mental health evaluation conducted on Miller by psychologists at Taylor Hardin Secure Medical Facility that was filed under seal with the circuit court and the mental evaluation of Miller by his expert, Dr. Charles Scott. [1]

For the reasons stated in Part II of this opinion, this case is remanded for the court to correct its sentencing order and make specific findings of fact regarding the existence of the aggravating circumstance that this offense was especially heinous, atrocious, or cruel when compared to other capital offenses. Our remand of this case for the circuit court to correct its sentencing order should not be taken as a judgment on the merits of Miller's guilt-phase arguments. However, in the interest of judicial economy, we have simply chosen to have a single remand so that the circuit court can comply with Alabama law, in order that this Court may better review the merits of each of Miller's arguments, without the need for another remand.

The circuit court shall take all necessary action to see that the circuit court makes ***1154** due return to this Court at the earliest possible time and within 90 days of the release of this opinion.

REMANDED WITH DIRECTIONS.

McMILLAN, P.J., and COBB, BASCHAB, and SHAW, JJ., concur.

On Return to Remand

WISE, Judge.

Alan Eugene Miller was convicted of capital murder in connection with the deaths of Lee Michael Holdbrooks, Christopher S. Yancy, and Terry Lee Jarvis. The murders were made capital because they were multiple murders committed "by one act or pursuant to one scheme or course of conduct." See § 13A-5-40(a)(10), Ala.Code 1975. After a sentencing hearing, the jury recommended, by a vote of 10-2, that Miller be sentenced to death. The trial court accepted the jury's recommendation and sentenced Miller to death.

On January 6, 2004, we remanded this case for additional action by the circuit court. See *Miller v. State,* 913 So.2d 1148 (Ala.Crim.App.2004). The circuit court has complied with our instructions and on return to remand has submitted (1) an amended sentencing order containing specific findings of fact regarding the existence of the aggravating circumstance that this offense was especially heinous, atrocious, or cruel when compared to other capital offenses, and (2) an order denying Miller's motion for a new trial making specific written findings of fact regarding each of the claims raised during the hearing on Miller's motion for a new trial.

Facts

The evidence presented at trial tended to establish the following. Around 7:00 a.m. on August 5, 1999, Johnny Cobb arrived at his place of employment, Ferguson Enterprises in

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Pelham. Cobb, the vice president of operations, recognized several other vehicles in the company's parking lot as belonging to sales manager Scott Yancy and delivery truck drivers Lee Holdbrooks and Alan Miller. As Cobb prepared to enter the building, he heard some loud noises and what sounded like someone screaming. Cobb opened the front door and saw Miller walking toward him. Miller, who was armed with a pistol, pointed the pistol in the general direction of Cobb and stated, "I'm tired of people starting rumors on me." Cobb tried to get Miller to put the pistol down, but Miller told him to get out of his way. Cobb ran out the front door and around the side of the building. Miller then left the building, walked over to his personal truck, and drove away.

After Cobb heard Miller drive away, he went back inside the building. He saw Christopher Yancy on the floor in the sales office and Lee Holdbrooks on the floor in the hallway. Both men were covered in blood and showed no signs of life. They appeared to have been shot multiple times. Cobb used his cellular telephone to summon the police, who were dispatched at 7:04 a.m. Minutes later, officers from the Pelham Police Department arrived to investigate the shooting.

After Cobb told the police officers what he had seen, the officers entered the building. There, they found the body of Christopher Yancy slumped to the floor, underneath a desk in the sales office. Lee Holdbrooks was lying face down in the hallway at the end of a bloody "crawl trail," indicating that he had crawled 20-25 feet down the hall in an attempt to escape his assailant. The officers secured the scene and waited for evidence technicians to arrive. Cobb provided a description of Miller's clothing and the truck he was driving. This description was transmitted ***1155** to police headquarters and sent out over the police radio by the police dispatcher. Evidence technicians recovered nine .40-caliber shell casings from the scene.

While officers began investigating the crime scene at Ferguson Enterprises, Andy Adderhold was arriving for work at Post Airgas in Pelham. Adderhold, the manager of the Pelham store, arrived shortly after 7:00 a.m. Adderhold entered the office and talked with Terry Jarvis, another employee, for a few minutes before continuing to another office. At this point, Adderhold noticed Miller-a former employee of Post Airgas-enter the building. Miller walked toward the sales counter and called out to Jarvis: "Hey, I hear you've been spreading rumors about me." As Jarvis walked out of his office and walked into the area behind the sales counter, he replied, "I have not." Miller fired several shots at Jarvis. As Jarvis fell to the floor, Adderhold crouched behind the counter. Miller then walked behind the counter and pointed the pistol at Adderhold's face. Adderhold begged for his life. Miller paused, then pointed to a door, and told him to get out. Adderhold stood up and, as he began to move toward the door, heard a sound from Jarvis. When Adderhold paused and looked back at Jarvis, Miller repeated his order to "get out-right now." At this Adderhold left the sales area. As Adderhold was leaving the building, he heard another gunshot. Adderhold proceeded out of the back of the building, climbed over a fence to a neighboring building, where he used someone's cellular telephone to summon the police.

The second emergency call came in to the Pelham Police Department at approximately 7:18 a.m. Upon arrival, officers entered the building housing Post Airgas and found Jarvis's body on the floor behind the sales counter. Jarvis had sustained several gunshot wounds to his chest and abdomen. After securing the scene, officers recovered six .40-caliber spent shell casings from the floor of the sales area. Adderhold was interviewed, and he recounted the events surrounding Jarvis's murder.

After a description of Miller and the vehicle he was driving was transmitted over the police radio, law-enforcement officers combed the area in search of Miller. Pelham police sergeant Stuart Davidson and his partner were patrolling Interstate 65 near Alabaster when word of the second shooting was broadcast. Upon hearing that Miller was still in the vicinity of Pelham, Davidson exited I-65 to head back to Pelham. As Davidson turned back toward Pelham, he spotted a truck matching the description of Miller's entering I-65 from Highway 31 in Alabaster. Davidson radioed for backup and followed the truck south on I-65 into Chilton County. Once additional officers were in place as backup, law-enforcement officers initiated a traffic stop of the truck. Following the traffic stop, officers were able to positively identify the driver as Miller. Miller was ordered to get out of the truck, and he was forcibly subdued and handcuffed after resisting efforts to place him in custody. After placing Miller in the back of a patrol car, officers secured his truck. Inside the truck, they found a Glock brand pistol lying on the driver's seat. The pistol contained 1 round in the chamber and 11 rounds in the magazine. An empty Glock ammunition magazine was found on the passenger seat. Miller was transported to the Pelham Police Department where he was charged with murder.

At trial, the State called various witnesses who testified concerning the events of August 5, 1999. Evidence was

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also introduced regarding ballistics testing of the spent shell casings found at both murder sites; the testing matched all of the shell casings to the .40-caliber Glock pistol ***1156** found on Miller. Dr. Stephen Pustilnik, a state medical examiner with the Alabama Department of Forensic Sciences, testified that the cause of death for all three victims was multiple gunshot wounds. Lee Holdbrooks-whose body was found in the hallway-was shot six times in the head and chest; although several of the wounds were nonfatal, one of the head wounds was fired at very close range and would have been immediately incapacitating and fatal. Based on "blood splatter" analysis and the positioning of the body, Dr. Pustilnik concluded that Holdbrooks was turning his head and looking up when the fatal shot was fired.

Scott Yancy was shot three times; one of the shots struck the aorta, which would have caused Yancy to "bleed out" within 15-20 minutes, while another wound would have caused paralysis. At the time he was shot, Yancy was underneath a metal desk; there was no indication that he ever moved from this position.

Terry Jarvis was shot five times; one of the shots struck Jarvis's liver and another his heart. Jarvis had already fallen to the floor when he was shot in the heart. Based on "blood splatter" analysis, Dr. Pustilnik concluded that Miller was standing over Jarvis as he shot him in the heart. Despite the nature of this wound, Jarvis could have lived anywhere from several minutes to 15 minutes after being shot.

Miller's defense counsel rested without putting on any evidence. After both sides had rested and the trial court instructed the jury on the law applicable to Miller's case, the jury determined that the murders of Holdbrooks, Yancy, and Jarvis were committed pursuant to a common scheme or plan, and it convicted Miller of capital murder.

During the penalty phase of Miller's trial, the State resubmitted all of the evidence it had introduced during the guilt phase. The State also presented brief testimony from three family members of the victims. One witness testified on behalf of each victim.

Miller offered the testimony of one witness during the penalty phase. Dr. Charles Scott, a forensic psychiatrist, testified regarding Miller's mental state at the time of the offenses. In preparing his report, Dr. Scott reviewed police records and witness statements, interviewed Miller and various family members, and arranged for psychological testing. Dr. Scott also reviewed Alabama's statutory definition of insanity. Based on this evidence, Dr. Scott determined that Miller was mentally ill at the time of the offenses. In Dr. Scott's opinion, Miller suffered from a delusional disorder that substantially impaired his rational ability. This delusional disorder-coupled with Miller's history as a loner-resulted in Miller's believing the people he worked with talked about him and that they had spread rumors about him. Miller believed that Terry Jarvis had told other employees at Post Airgas that Miller was a homosexual. However, Dr. Scott concluded, Miller's condition did not rise to the level of mania necessary to establish an insanity defense under Alabama law.

According to Dr. Scott, in the weeks immediately before the shootings, Miller became more and more agitated about the perceived harassment by his current and former coworkers. On the morning of the shooting, Miller told Dr. Scott that although he "felt an increased feeling of pressure" as he entered Ferguson Enterprises, he was not thinking of shooting Holdbrooks and Yancy. However, Miller recounted to Dr. Scott, when Holdbrooks "smarted off" to him, it "was like the straw that broke the camel's back" and he pulled out his pistol and began shooting. Following the shooting, all Miller could think of ***1157** was shooting Terry Jarvis, so he drove to Post Airgas and shot him. After that, Miller told Dr. Scott that he felt as if the pressure had been lifted off him and that everything was calm.

After both sides had rested and the trial court instructed the jury on the law applicable to the penalty phase, the jury returned an advisory verdict recommending that Miller be sentenced to death.

Standard of Review

In every case where the death penalty is imposed, this Court must review the record for any plain error, i.e., for any defect in the proceedings, whether or not the defect was brought to the attention of the trial court. Rule 45A, Ala.R.App.P., provides:

> "In all cases in which the death penalty has been imposed, the Court of Criminal Appeals shall notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court, and

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take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial right of the appellant."

[1] As this Court stated in *Hall v. State,* 820 So.2d 113, 121-22 (Ala.Crim.App.1999), aff'd, 820 So.2d 152 (Ala.2001):

"The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal. As the United States Supreme Court stated in *United States v. Young,* 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), the plain-error doctrine applies only if the error is 'particularly egregious' and if it 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' See *Ex parte Price,* 725 So.2d 1063 (Ala.1998), cert. denied, 526 U.S. 1133, 119 S.Ct. 1809, 143 L.Ed.2d 1012 (1999); *Burgess v. State,* 723 So.2d 742 (Ala.Cr.App.1997), aff'd, 723 So.2d 770 (Ala.1998), cert. denied, 526 U.S. 1052, 119 S.Ct. 1360, 143 L.Ed.2d 521 (1999); *Johnson v. State,* 620 So.2d 679, 701 (Ala.Cr.App.1992), rev'd on other grounds, 620 So.2d 709 (Ala.1993), on remand, 620 So.2d 714 (Ala.Cr.App.), cert. denied, 510 U.S. 905, 114 S.Ct. 285, 126 L.Ed.2d 235 (1993)."

[2] Although Miller's failure to object at trial will not preclude this Court from reviewing an issue in this case, it will, nevertheless, weigh against any claim of prejudice he makes on appeal. See *Dill v. State,* 600 So.2d 343 (Ala.Crim.App.1991), aff'd, 600 So.2d 372 (Ala.1992), cert. denied, 507 U.S. 924, 113 S.Ct. 1293, 122 L.Ed.2d 684 (1993).

Some of the issues Miller raises on appeal were not first brought to the trial court's attention. Accordingly, this Court's review of those matters is limited to review under the plain-error doctrine.

Guilt-Phase Issues

I.

Miller argues that his conviction and death sentence are due to be vacated because, he says, he lacked the necessary intent to commit murder. Specifically, Miller contends that his mental instability at the time of the offenses prevented him from forming the requisite mental intent to commit intentional murder, as required by § 13A-5-40(a), Ala.Code 1975. Because this claim is presented for the first time on appeal, it will be reviewed under the plain-error doctrine.

[3] **[4]** " 'In determining the sufficiency of the evidence to sustain a conviction, a reviewing court must accept as true all evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider all evidence in a light ***1158** most favorable to the prosecution.' " *Ballenger v. State,* 720 So.2d 1033, 1034 (Ala.Crim.App.1998) (quoting *Faircloth v. State,* 471 So.2d 485, 488 (Ala.Crim.App.1984), aff'd, 471 So.2d 493 (Ala.1985)). " 'The test used in determining the sufficiency of evidence to sustain a conviction is whether, viewing the evidence in the light most favorable to the prosecution, a rational finder of fact could have found the defendant guilty beyond a reasonable doubt.' " *Nunn v. State,* 697 So.2d 497, 498 (Ala.Crim.App.1997) (quoting *O'Neal v. State,* 602 So.2d 462, 464 (Ala.Crim.App.1992)). " 'When there is legal evidence from which the jury could, by fair inference, find the defendant guilty, the trial court should submit [the case] to the jury, and, in such a case, this court will not disturb the trial court's decision.' " *Farrior v. State,* 728 So.2d 691, 696 (Ala.Crim.App.1998) (quoting *Ward v. State,* 557 So.2d 848, 850 (Ala.Crim.App.1990)). "The role of appellate courts is not to say what the facts are. Our role ... is to judge whether the evidence is *legally* sufficient to allow submission of an issue for decision [by] the jury." *Ex parte Bankston,* 358 So.2d 1040, 1042 (Ala.1978). "The question whether a defendant intentionally caused the death of another person is a question of fact for the jury. *Carr v. State,* 551 So.2d 1169 (Ala.Cr.App.1989)." *Ex parte Carroll,* 627 So.2d 874, 878 (Ala.1993), cert. denied, 510 U.S. 1171, 114 S.Ct. 1207, 127 L.Ed.2d 554 (1994). "The question of intent is hardly ever capable of direct proof. Such a question is normally a question for the jury. *Loper v. State,* 469 So.2d 707 (Ala.Cr.App.1985)." *Lucas v. State,* 792 So.2d 1161, 1168 (Ala.Crim.App.1999), rev'd on other grounds, 792 So.2d 1169 (Ala.2000).

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During the guilt phase of the trial, Miller offered no evidence in his defense. Although it appears that Miller initially asserted a defense of not guilty by reason of mental disease or defect, this defense was withdrawn before trial. Therefore, the jury was not asked to determine whether Miller was mentally capable of forming the requisite mental intent to intentionally murder the three victims pursuant to a common scheme or plan. Indeed, Miller's claim that he lacked the requisite mental intent to commit murder is based on the testimony of Dr. Charles Scott, which was not presented until the penalty phase of his trial. Moreover, even Dr. Scott conceded that Miller's mental condition did not rise to the level of mania necessary to establish an insanity defense under Alabama law. Here, the jury was charged on the capital offense of the intentional murder of three persons pursuant to a common scheme or course of conduct and the lesser-included offense of the intentional murders of the three victims that were not committed pursuant to a common scheme or plan. The trial court instructed the jury that it must find the requisite intent by proof beyond a reasonable doubt as an element of the charged offense. Because no insanity defense was presented, the jury was not asked to determine Miller's ability to form the requisite intent to commit intentional murder. We know of no caselaw requiring a trial court to charge the jury on an affirmative defense that is withdrawn before trial begins.

[5] Based on the evidence presented during the guilt phase of Miller's trial, the jury concluded that Miller's conduct was intentional. The testimony of the surviving witnesses, Johnny Cobb and Andy Adderhold-together with the forensic evidence-established that Miller intentionally drew his pistol and shot his three victims multiple times. Given these circumstances, we find no merit to Miller's claim that the trial court should have submitted his insanity defense to the jury for its consideration, despite the fact that ***1159** that defense was withdrawn before trial. Accordingly, no basis for reversal exists as to this claim.

II.

Miller next argues that he was denied the effective assistance of counsel at both the guilt phase and the penalty phase of his trial. Miller, who was represented by new counsel appointed following his conviction and sentence, presented his ineffective-assistance-of-counsel claims in his motion for a new trial.

[6] **[7]** "At a hearing on a motion for new trial, the defendant has the burden of proving the allegations of his motion to the satisfaction of the trial court." *Miles v. State,* 624 So.2d 700, 703 (Ala.Crim.App.1993) (citing *Anderson v. State,* 46 Ala.App. 546, 547, 245 So.2d 832, 833 (1971), and *Jones v. State,* 31 Ala.App. 504, 507, 19 So.2d 81, 84 (1944)). "The trial court's ruling on a motion for a new trial is presumed to be correct and will be upheld on appeal unless found to be clearly erroneous." *Taylor v. State,* 808 So.2d 1148, 1171 (Ala.Crim.App.2000), aff'd, 808 So.2d 1215 (Ala.2001), cert. denied, 534 U.S. 1086, 122 S.Ct. 824, 151 L.Ed.2d 705 (2002) (citing *Ex parte Frazier,* 562 So.2d 560, 570 (Ala.1989)).

At the hearing on Miller's motion for a new trial, Mickey Johnson, Miller's trial counsel, testified. Johnson stated that when he was appointed to represent Miller on the day of the shootings, he had been practicing law for 25 years. He met with Miller shortly after Miller was apprehended and again later that night. That same day, Johnson also met with several Pelham police officers and with Miller's mother.

Johnson had litigated five or six capital-murder cases before he was appointed to represent Miller. Roger Bass was initially appointed cocounsel; however, when Bass withdrew, Ronnie Blackwood was appointed to serve as cocounsel.

Johnson met with Miller on a number of occasions before trial. Before forming a strategy for Miller's case, Johnson reviewed all of the investigative reports, diagrams, statements, photographs, videotapes, and scientific reports; he also talked with his client. Johnson filed a motion requesting funds for an independent psychological evaluation of Miller. The trial court granted his motion, and Johnson retained Dr. Charles Scott from the University of California to evaluate Miller. After talking with Dr. Scott and reviewing Dr. Scott's written report, Johnson determined that there was insufficient evidence to raise an insanity defense during the guilt phase. In his opinion, it was better to present Dr. Scott's testimony during the penalty phase because presenting his testimony at the guilt phase would have negated Dr. Scott's credibility and lessened the potential impact of the evidence during the penalty phase. Johnson made this decision after reviewing the reports from other mental-health evaluations of Miller, which were consistent with Dr. Scott's findings.

After reviewing the evidence, Johnson made a strategic decision to concentrate his efforts and defense on the penalty phase of the trial. In his opinion, the State's evidence of

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Miller's guilt "was too overwhelming to seriously contest," given that he had no valid legal defense for the guilt phase. Accordingly, Johnson decided to concentrate on saving Miller's life.

Johnson focused his efforts during the guilt phase on maintaining credibility with the jury. In accordance with this strategy, he admitted to the jury early on in the proceedings that the evidence of Miller's guilt was strong because he wanted to lessen the impact of the evidence against Miller. Johnson felt that his duty during ***1160** the guilt phase was to make the State meet its burden of proof.

During the penalty phase, Johnson presented a diminished-capacity defense. Through Dr. Scott's testimony, he presented two mitigating circumstances. He also argued the undisputed mitigating circumstance of no prior criminal history. During the penalty phase, Johnson argued that the State had failed to prove any aggravating circumstances. He also wanted to point out to the jury that the mitigating circumstances were undisputed. Johnson hoped that the jury was looking for a reason not to recommend the death penalty, and that his arguments would give the jury a sound legal basis for recommending a sentence of life imprisonment without the possibility of parole.

Before the penalty phase, Johnson talked with Miller's parents and other family members. He considered calling them as witnesses. However, after talking with Miller's family, he determined that it was best to present Miller's social and family history through Dr. Scott's testimony. In Johnson's opinion, Dr. Scott was a credible witness. Johnson also believed that the support Miller had from his family members during trial was affecting the jury in a positive way. Johnson believed that the jurors sympathized with Miller's family and he did not want to detract from this sympathy by putting family members on the stand.

Miller presented testimony from two other witnesses in support of his motion for a new trial. Dr. Bob Wendorf, a clinical psychologist, testified that based on his review of Dr. Scott's report, he believed there were other possible mitigating factors Johnson could have presented. Miller also elicited testimony from Aaron McCall with the Alabama Prison Project. McCall indicated that he had sent Johnson a letter in August 1999, offering his services in Miller's case. However, McCall testified, Johnson never responded to his letter.

To prevail on a claim of ineffective assistance of counsel, a defendant must establish (1) that his counsel's performance was deficient, and (2) that he was prejudiced by the deficient performance. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Ex parte Lawley,* 512 So.2d 1370, 1372 (Ala.1987). "The performance component outlined in *Strickland* is an objective one: that is, whether counsel's assistance, judged under 'prevailing professional norms,' was 'reasonable considering all the circumstances.' " *Daniels v. State,* 650 So.2d 544, 552 (Ala.Crim.App.1994) (quoting *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052). "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland,* 466 U.S. at 690, 104 S.Ct. 2052.

[8] **[9]** **[10]** A defendant is not entitled to an error-free trial, and the fact that trial counsel made a mistake is not enough to show that counsel's performance was ineffective. See *Cosby v. State,* 627 So.2d 1059 (Ala.Crim.App.1993). Moreover, the fact that trial counsel did not object at every possible instance does not mean that a defendant's counsel was incompetent. See *O'Neil v. State,* 605 So.2d 1247, 1250 (Ala.Crim.App.1992). An attorney is not required to raise every conceivable claim available at trial or on appeal in order to render effective assistance. *Thomas v. State,* 766 So.2d 860 (Ala.Crim.App.1998), aff'd, 766 So.2d 975 (Ala.2000); *Holladay v. State,* 629 So.2d 673 (Ala.Crim.App.1992).

[11] When reviewing a claim of ineffective assistance of counsel, this Court indulges a strong presumption that counsel's ***1161** conduct was appropriate and reasonable. *Hallford v. State,* 629 So.2d 6 (Ala.Crim.App.1992); *Luke v. State,* 484 So.2d 531 (Ala.Crim.App.1985). Moreover, this Court should avoid using "hindsight" to evaluate counsel's performance. Instead, we must consider the circumstances surrounding the case at the time of counsel's actions before determining whether counsel's assistance was ineffective. *Hallford,* 629 So.2d at 9; see also, e.g., *Cartwright v. State,* 645 So.2d 326 (Ala.Crim.App.1994).

A. *Guilt-phase claims*

[12] Miller contends that his counsel's opening remarks indicated that counsel was serving "more like a second prosecutor" rather than defense counsel. In a similar vein,

Miller claims that he was prejudiced by his counsel's decision not to put on an insanity defense during the guilt phase of his trial. Miller also complains of counsel's admission during the guilt stage of the trial that his defense was "feeble at best." Akin to this claim are Miller's allegations that his defense was prejudiced by counsel's failure to adequately cross-examine the State's witnesses and his failure to call any witnesses.

[13] **[14]** However, as indicated by counsel's testimony at the hearing on his new-trial motion, those decisions were made after a thorough investigation of the relevant law and facts of Miller's case. This is not a case where counsel failed to investigate a potential mental-health defense or neglected to interview potential defense witnesses. Instead, Johnson's decision was part of his strategy to spare Miller's life. See *Samra v. State,* 771 So.2d 1108, 1120 (Ala.Crim.App.1999), aff'd, 771 So.2d 1122 (Ala.), cert. denied, 531 U.S. 933, 121 S.Ct. 317, 148 L.Ed.2d 255 (2000). "Strategic choices made after a thorough investigation of relevant law and facts are virtually unchallengeable." *Ex parte Lawley,* 512 So.2d at 1372. Further, a mere difference of opinion between a defendant and his trial counsel is insufficient to render counsel's performance ineffective. *Patrick v. State,* 680 So.2d 959, 962 (Ala.Crim.App.1996). Under the circumstances of this case, defense counsel made a well-reasoned decision to focus his efforts on that part of the trial that he believed offered the greatest chance of success. We see no reason to second-guess defense counsel's decisions regarding this strategy.

[15] Miller also contends that his trial counsel's representation was deficient because counsel did not use evidence regarding Miller's delusions to show the murders were committed in a heat of passion, rather than as part of a common scheme or plan. Miller cites no authority for this contention. Likewise, our research has failed to locate any Alabama authority that supports such a proposition. The fact that a victim may have spread rumors about the defendant or "smarted off" to a defendant is insufficient to mitigate an intentional killing under any doctrine of provocation or heat of passion. See, e.g., *Bone v. State,* 706 So.2d 1291, 1297 (Ala.Crim.App.1997) (citing *Harrison v. State,* 580 So.2d 73, 74 (Ala.Crim.App.1991) (mere words or gestures will not reduce a homicide from murder to manslaughter)).

[16] Finally, Miller challenges counsel's decision not to move for a change of venue. However, Miller has failed to establish any basis for such a claim. Indeed, this court rejected similar change-of-venue claims in two other high-profile capital-murder prosecutions that occurred in Shelby County. In one of those cases, this Court noted:

> " 'The mere fact that publicity and media attention were widespread is not sufficient to warrant a change of venue. Rather, *Ex parte* ***1162** *Grayson*[, 479 So.2d 76 (Ala.1985),] held that the appellant must show that he suffered actual prejudice or that the community was saturated with prejudicial publicity.' *Slagle v. State,* 606 So.2d 193, 195 (Ala.Cr.App.1992). ' "Moreover, the passage of time cannot be ignored as a factor in bringing objectivity to trial." ' *Whisenhant v. State,* 555 So.2d 219, 224 (Ala.Cr.App.1988), aff'd, 555 So.2d 235 (Ala.1989), cert. denied, 496 U.S. 943, 110 S.Ct. 3230, 110 L.Ed.2d 676 (1990) (citations omitted) (quoting *Dannelly v. State,* 47 Ala.App. 363, 254 So.2d 434, cert. denied, 287 Ala. 729, 254 So.2d 443 (1971)).
>
> > " 'In connection with pretrial publicity, there are two situations which mandate a change of venue: 1) when the accused has demonstrated "actual prejudice" against him on the part of the jurors; 2) when there is "presumed prejudice" resulting from community saturation with such prejudicial pretrial publicity that no impartial jury can be selected. *Sheppard v. Maxwell,* 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); *Rideau* [*v. Louisiana,* 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963)]; *Estes v. Texas,* 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965); *Ex parte Grayson,* 479 So.2d 76, 80 (Ala.), cert. denied, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 157 (1985); *Coleman v. Zant,* 708 F.2d 541 (11th Cir.1983).'
>
> "*Hunt v. State,* 642 So.2d 999, 1042-43 (Ala.Cr.App.1993), aff'd, 642 So.2d 1060 (Ala.1994)."

Samra v. State, 771 So.2d at 1113; accord *Duke v. State,* 889 So.2d 1, 15 (Ala.Crim.App.2002).

Here, the potential for actual juror prejudice was addressed through voir dire during the selection of the jury. Through the use of juror questionnaires and individual voir dire, any potential jurors who may have had fixed opinions regarding Miller's guilt were excused from service. Nor was there any showing that media coverage created a presumption of actual prejudice. See *Ex parte Travis,*

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776 So.2d 874, 879 (Ala.2000). Given these circumstances, defense counsel cannot be said to have rendered ineffective assistance by not seeking a change of venue where there was insufficient evidence to show that he was entitled to such a change. See, e.g. *Bedwell v. State,* 710 So.2d 493, 497 (Ala.Crim.App.1997) ("Counsel cannot be said to be ineffective for failing to file a motion for which there is no legal basis.").

B. *Penalty-phase claims*

[17] Miller contends that trial counsel's opening statement at the penalty phase prejudiced his defense and any mitigating evidence to be presented during the penalty-phase portion of his trial. Specifically, Miller claims that counsel's opening statement undermined the credibility of the only defense witness being offered-Dr. Charles Scott. The end result of counsel's opening statement, Miller claims, suggested to the jury that Miller deserved to be sentenced to death.

We have reviewed trial counsel's opening statement in its entirety. Consistent with counsel's trial strategy-as testified to during the hearing on Miller's new-trial motion-counsel elected to acknowledge Dr. Scott's conclusion that there was no basis under Alabama law to support an insanity defense in an effort to retain his credibility before the jury and to secure an advisory verdict of life imprisonment without parole, rather than the death sentence. Given the overwhelming evidence of Miller's guilt-including eyewitness testimony identifying Miller as the shooter-counsel had little choice but to acknowledge Miller's guilt. Accordingly, counsel attempted to gain the jury's sympathy by using Dr. Scott's testimony to portray Miller as a ***1163** "tortured soul" whose delusions drove him to commit a series of horrific acts. Indeed, our review of counsel's argument reveals it to be an impassioned plea that the jury spare Miller's life.

Miller also contends that counsel was ineffective because he failed to exclude "victim impact" testimony offered by the victims' family members. As will be discussed in Part IV of this opinion, that testimony was admissible. See, e.g., *Taylor v. State,* 808 So.2d 1148, 1167 (Ala.Crim.App.2000), aff'd, 808 So.2d 1215 (Ala.2001), cert. denied, 534 U.S. 1086, 122 S.Ct. 824, 151 L.Ed.2d 705 (2002); *Boyd v. State,* 746 So.2d 364, 383 (Ala.Crim.App.1999).

[18] Miller further contends that trial counsel's failure "to adequately explore all possible mitigating routes" left counsel unable to make well-informed decisions on the question of mitigation. As set out above, counsel testified at length regarding his representation of Miller, including his investigation of the relevant law and facts, and his strategy to save Miller from a sentence of death. Counsel explained his reasons for presenting evidence regarding Miller's family and social history through Dr. Scott's testimony, rather than through various family members. Based on our review of the record, we fail to see what other mitigating evidence counsel could have offered. Moreover, despite Miller's allegations, he offers no additional mitigating evidence that counsel did not discover during his investigation or that counsel failed to consider in formulating his defense strategy. Accordingly, we are unable to say that counsel was ineffective as to this claim. See *Lawhorn v. State,* 756 So.2d 971, 986 (Ala.Crim.App.1999).

Miller contends that trial counsel's performance was deficient because he failed to challenge the constitutionality of the statutory aggravating circumstance set out in § 13A-5-49(8), that the capital offense of which he was convicted was "especially heinous, atrocious, or cruel compared to other capital offenses." As will be discussed in Part V of this opinion, this Court has consistently recognized the constitutionality of this aggravating circumstance. See, e.g., *Ingram v. State,* 779 So.2d 1225, 1277 (Ala.Crim.App.1999), aff'd, 779 So.2d 1283 (Ala.2000). Because there was no merit to this claim, counsel's performance was not deficient for failing to raise it. See, e.g., *Thomas v. State,* 766 So.2d at 950; *Bedwell v. State,* 710 So.2d at 497.

Penalty-Phase Issues

III.

Miller argues that his death sentence should be vacated because, he says, "Capital punishment as practiced throughout this nation, as well as in this State, is performed in an arbitrary and capricious manner which violates the basic principles providing the foundation of our legal system." Additionally, he argues that the "use of electrocution as a means of execution is inherently cruel and inhumane."

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This Court has consistently rejected broad general allegations that Alabama's capital-punishment statute is unconstitutional. See, e.g., *Clark v. State,* 896 So.2d 584, 597 (Ala.Crim.App.2000) (opinion on return to remand); *Williams v. State,* 627 So.2d 985, 993 (Ala.Crim.App.1991), aff'd, 627 So.2d 999 (Ala.1993).

> "There is an abundance of caselaw ... that holds that the death penalty is not per se cruel and unusual punishment. Neither is electrocution, as a means of capital punishment, cruel and unusual punishment, in violation of the Eighth Amendment. *Williams v. State,* 556 So.2d 737, 741 (Ala.Cr.App.1986), aff'd in part, rev'd in part on other grounds, 556 So.2d 744 (Ala.1987); ***1164** *Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972); *Zant v. Stephens,* 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983); *Boykin v. State,* 281 Ala. 659, 207 So.2d 412 (1968), reversed on other grounds, *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)."

Scott v. State, 728 So.2d 164, 171 (Ala.Crim.App.1997), aff'd, 728 So.2d 172 (Ala.1998), cert. denied, 528 U.S. 831, 120 S.Ct. 87, 145 L.Ed.2d 74 (1999).

[19] Miller offers no novel arguments in support of his contention. Accordingly, we rely on our previous holdings and reject his contention that the manner of execution-electrocution-used by the State of Alabama constitutes cruel and unusual punishment. We further note the enactment by the Legislature of Act No. 2002-492, Ala. Acts 2002, which provides for lethal injection as an alternate means of execution. Act No. 2002-492 became effective July 1, 2002. The passage of this Act effectively rendered Miller's constitutional challenge to the method of execution in this State moot.

IV.

During the penalty phase of Miller's trial, the State offered testimony by Lee Holdbrooks's father, Scott Yancy's father, and Terry Jarvis's sister, concerning each of the three victims. Each witness offered a brief statement regarding how the victims' deaths had affected the family members left behind. No objection was made to this testimony.

[20] Miller now argues that the trial court erred in admitting "victim impact" testimony because, he says, the sole purpose of this evidence was to inflame the passions of the jury during the penalty phase of his trial. Specifically, he argues that § 13A-5-45(c), Ala.Code 1975, mandates that to be relevant and admissible during the penalty phase of trial victim-impact testimony must relate to one of the aggravating circumstances set out in § 13A-5-49, Ala.Code 1975.

Miller's contention is incorrect. The United States Supreme Court has specifically recognized the admissibility of victim-impact testimony to offer the jury a "quick glimpse" of the uniqueness of the life taken by the defendant. *Payne v. Tennessee,* 501 U.S. 808, 823, 830-31, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). Moreover, this Court has followed the holding in *Payne v. Tennessee* on numerous occasions, recognizing the admissibility of evidence of this kind as relevant to the determination of the appropriate punishment to be imposed. See, e.g., *Taylor v. State,* 808 So.2d 1148, 1167 (Ala.Crim.App.2000), aff'd, 808 So.2d 1215 (Ala.2001), cert. denied, 534 U.S. 1086, 122 S.Ct. 824, 151 L.Ed.2d 705 (2002).

> " 'If a State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the impact of murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated.' "

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Boyd v. State, 746 So.2d 364, 383 (Ala.Crim.App.1999) (quoting *Payne v. Tennessee,* 501 U.S. at 827, 111 S.Ct. 2597). See also *McNair v. State,* 653 So.2d 320, 331 (Ala.Crim.App.1992), aff'd, 653 So.2d 353 (Ala.1994) ("[A] prosecutor may present and argue evidence relating to the victim and the impact of the victim's death on the victim's family in the penalty phase of a capital trial.").

***1165** Here, the glimpse into the lives taken by Miller was properly presented to the jury by way of brief testimony offered by the three family members. (R. 1345-51.) This testimony was relevant to determining the appropriate punishment. See *Ex parte Loggins,* 771 So.2d 1093, 1103 (Ala.2000) (" 'evidence is relevant if it has any probative value, however slight, upon a matter at issue in the case' "). Accordingly, no basis for reversal exists as to this claim.

V.

Miller argues that the trial court erred in finding that the offense was especially heinous, atrocious, or cruel when compared to other capital offenses. Specifically, Miller challenges the constitutionality of this aggravating circumstance, as well as the evidence upon which the court based its finding that this aggravating circumstance was applicable to this case. (Appellant's brief, parts II and V.)

This Court has addressed the constitutionality of the "especially heinous, atrocious, or cruel" aggravating circumstance on numerous occasions. We have consistently upheld the constitutionality of this aggravating circumstance:

> "To the extent that Ingram is claiming that the 'especially heinous, atrocious or cruel' statutory aggravating circumstance found in § 13A-5-49(8)[, Ala.Code 1975], is unconstitutionally vague and overbroad on its face, that contention is without merit. See *Freeman v. State,* 776 So.2d 160 (Ala.Crim.App.1999); *Bui v. State,* 551 So.2d 1094 (Ala.Crim.App.1988), aff'd, 551 So.2d 1125 (Ala.1989), judgment vacated on other grounds, 499 U.S. 971, 111 S.Ct. 1613, 113 L.Ed.2d 712 (1991); *Hallford v. State,* 548 So.2d 526 (Ala.Crim.App.1988), aff'd, 548 So.2d 547 (Ala.), cert. denied, 493 U.S. 945, 110 S.Ct. 354, 107 L.Ed.2d 342 (1989)."

Ingram v. State, 779 So.2d 1225, 1277 (Ala.Crim.App.1999), aff'd, 779 So.2d 1283 (Ala.2000). See also *Duke v. State,* 889 So.2d 1, 36 (Ala.Crim.App.2002).

[21] When considering whether a particular capital offense was "especially heinous, atrocious, or cruel," this Court adheres to the standard set out in *Ex parte Kyzer,* 399 So.2d 330, 334 (Ala.1981), namely, that the particular offense must be one of those "conscienceless or pitiless homicides which are unnecessarily torturous to the victim."

[22] With regard to the application of the aggravating circumstance that the murders were especially heinous, atrocious, or cruel, the circuit court made the following findings of fact on remand:

> "On the morning of August 5, 1999, Defendant shot and killed three men, namely, Christopher Yancy ('Yancy'), age 28 years; Lee Holdbrooks ('Holdbrooks'), age 32; and Terry Jarvis ('Jarvis'), age 39 years. Yancy and Holdbrooks were both shot at one location and thereafter Jarvis was shot at another location. Each of those victims sustained multiple wounds.
>
> "Yancy suffered three wounds to his body. It appears the first shot entered his leg and traveled through his groin and into his spine, paralyzing him. He was unable to move, unable to defend himself and was trying to hide from Defendant under a desk. Yancy had a cell phone an inch or two from his hand, but because of his paralysis was unable to reach it and call for help. Yancy had to have been afraid his life was about to be taken. Moments elapsed. Defendant appeared to have then stooped under the desk and have made eye contact with Yancy before shooting him twice more causing his death.

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***1166** "Holdbrooks suffered six wounds to his body. Defendant shot Holdbrooks several times. Holdbrooks crawled down a hallway for about twenty-five feet. Holdbrooks was uncertain whether he would live or die as he crawled down the hallway and quite possibly his life was flashing by in his mind. Defendant took his gun and within two inches of Holdbrooks' head, pulled the trigger for the sixth and final time, the bullet entering Holdbrooks' head causing him to die in a pool of blood.

"Jarvis was shot five times, the last shot being no more than 46 inches away from his body. Before Jarvis was shot, Defendant had pointed a gun at him in the presence of a witness. Defendant had accused Jarvis of spreading rumors about him which Jarvis had denied. Defendant shot Jarvis four times in the chest. Defendant allowed the witness to leave. No one knows at that point what went through Jarvis' mind. Having denied he spread any rumors, he must have wondered why Defendant had not believed him and as the witness was allowed to leave that maybe there would be no more shooting and his life would be spared. Defendant then shot Jarvis through his heart ending Jarvis' life.

"It appears all three of Defendant's victims suffered for a while not only physically, but psychologically. In each instance, there appeared to have been hope for life while they were hurting, only to have their fate sealed by a final shot, execution style.

"Based upon the facts presented at this trial, these murders were calculated, premeditated and callous, with utter disregard of human life. The taking of these lives was among the worst in the memory of this Court and was well beyond the level of being especially heinous, atrocious or cruel."

In *Taylor v. State,* 808 So.2d 1148 (Ala.Crim.App.2000), aff'd, 808 So.2d 1215 (Ala.2001), cert. denied, 534 U.S. 1086, 122 S.Ct. 824, 151 L.Ed.2d 705 (2002), we addressed the application of this aggravating circumstance. We find the following language to be particularly relevant to this case:

"The Alabama appellate courts' interpretation of 'especially heinous, atrocious, or cruel' has passed muster under the Eighth Amendment because those courts have consistently defined the term to include only 'those conscienceless or pitiless homicides which are unnecessarily torturous to the victim.' *Ex parte Clark,* [728 So.2d 1126 (Ala.1998)], citing, *Lindsey v. Thigpen,* 875 F.2d 1509 (11th Cir.1989). The Alabama appellate courts have considered the infliction of psychological torture as especially indicative that the offense was 'especially heinous, atrocious or cruel.' Thus, the mental suffering where a victim witnesses the murder of another and then realizes that soon he or she will also be killed, has been found to be sufficient to support a finding of this aggravating circumstance. *Norris v. State,* 793 So.2d 847, 854 (Ala.Cr.App.1999). As the trial judge pointed out in his sentencing order, two of the victims here witnessed Taylor kill another victim. Both tried to run and hide, but were captured. Both begged and pleaded for their lives; one offering money and property, the other pleading for the sake of her children. Both were deliberately and methodically executed with a gunshot to the head as they pleaded for their lives. These murders were not accomplished in a rapid-fire manner; there was sufficient time between the three murders for the next victim to be placed in significant fear for his or her life, and the evidence ***1167** is clear that each was well aware of what was about to happen."

808 So.2d at 1169.

Here, just as in *Taylor,* there was sufficient time between the initial gunshot wounds and the final, fatal shots for each of the victims to realize his fate. Given the circumstances, the trial court properly concluded that the murder of the three victims was "especially heinous, atrocious, or cruel." See *Ex parte Clark,* 728 So.2d 1126, 1140 (Ala.1998).

VI.

After this case was argued and submitted, the United States Supreme Court released *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), and *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)-two cases that dramatically impacted death-penalty cases throughout the United States. We requested that Miller and the attorney general brief the issue of the applicability of *Ring* to Miller's conviction and death sentence. [1] We now address those arguments. [2]

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In *Ring,* the United States Supreme Court applied its earlier holding in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), to death-penalty cases and held that "[c]apital defendants ... are entitled to a jury determination on any fact on which the legislature conditions an increase in their maximum punishment." *Ring,* 536 U.S. at 589, 122 S.Ct. 2428.

Miller argues that imposition of the death penalty in Alabama requires fact-finding by a jury relating to both the existence of aggravating circumstances and the weighing of the aggravating circumstances against the mitigating circumstances. Because only the trial judge made these findings and the jury was not given the opportunity to return a verdict on any of the aggravating circumstances in his case, he argues that the Supreme Court's holding in *Ring* renders him ineligible for the death penalty. Miller also argues that because the jury was instructed that its verdict and findings were advisory, no reliable finding as to aggravating circumstances could have been made by the jury. Miller further argues that the indictment against him is void because, he says, it failed to specify the aggravating circumstances that supported the capital offense. Finally, Miller argues that both Alabama and federal law condemn the imposition of the death penalty by a judge, rather than by a jury.

The State counters by arguing that Miller's death sentence complies with *Ring* because the jury found at the guilt phase that Miller had committed a capital offense, thus making him eligible for the death sentence. Accordingly, the circuit court had the discretion under *Ring* to impose either the death sentence or a lesser sentence, with or without the jury's approval.

In several recent decisions, both this Court and the Alabama Supreme Court have agreed with the State's rationale that *Ring* did not invalidate Alabama's law, ***1168** which vests the ultimate sentence determination in the hands of the trial judge and not a jury. See, e.g., *Ex parte Hodges,* 856 So.2d 936 (Ala.2003); *Ex parte Waldrop,* 859 So.2d 1181 (Ala.2002); *Duke v. State,* 889 So.2d 1, opinion on return to remand, 889 So.2d 40 (Ala.Crim.App.2002); *Turner v. State,* [Ms. CR-99-1568, November 22, 2002] --- So.2d ---- (Ala.Crim.App.2002); *Stallworth v. State,* 868 So.2d 1128, 1178 (Ala.Crim.App.2001) (opinion on return to second remand). In each of these cases, we recognized the narrowness of the holding in *Ring,* noting that "[t]he *Ring* Court held that any aggravating circumstance that increased a sentence to death must be proved to a jury beyond a reasonable doubt"; however, we noted that the *Ring* Court "did not reach the question whether judicial sentencing or judicial override was constitutional." *Stallworth v. State,* 868 So.2d at 1183 (opinion on return to second remand). Indeed, we quote the following language from a footnote in *Ring:*

> "Ring's claim is tightly delineated: He contends only that the Sixth Amendment required jury findings on the aggravating circumstances asserted against him. No aggravating circumstance related to past convictions in his case; Ring therefore does not challenge *Almendarez-Torres v. United States,* 523 U.S. 224 (1998), which held that the fact of prior conviction may be found by the judge even if it increases the statutory maximum sentence. He makes no Sixth Amendment claim with respect to mitigating circumstances. See *Apprendi v. New Jersey,* 530 U.S. 466, 490-491, n. 16 (2000) (noting 'the distinction the Court has often recognized between facts in aggravation of punishment and facts in mitigation' (citation omitted [in *Ring*])). *Nor does he argue that the Sixth Amendment required the jury to make the ultimate determination whether to impose the death penalty.* See *Proffitt v. Florida,* 428 U.S. 242, 252 (1976) (plurality opinion) ('[I]t has never [been] suggested that jury sentencing is constitutionally required.'). He does not question the Arizona Supreme Court's authority to reweigh the aggravating and mitigating circumstances after that court struck one aggravator. See *Clemons v. Mississippi,* 494 U.S. 738, 745 (1990). Finally, Ring does not contend that his indictment was constitutionally defective. See *Apprendi,* 530 U.S. at 477, n. 3 (Fourteenth Amendment 'has not ... been construed to include the Fifth Amendment right to "presentment or indictment of a Grand Jury" ')."
>
> 536 U.S. at 597 n. 4, 122 S.Ct. 2428 (emphasis added).

[23] Here, the jury in the guilt phase entered a verdict finding Miller guilty of capital murder. Miller's case, however, differs from that of *Waldrop, Hodges, Turner*, and *Stallworth* because at the time Miller committed these offenses, the fact that the defendant "intentionally caused the death of two or more persons by one act or pursuant to one scheme or course of conduct" did not, alone, constitute an aggravating circumstance.[3] However, this does not require that Miller's

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death sentence be set aside. The State argues that once a jury returns a verdict finding the defendant guilty of capital murder, that defendant becomes "death-eligible." It is unnecessary to address the State's argument because the jury's 10-2 recommendation ***1169** of death during the sentencing phase indicated that it must have found the existence of the aggravating circumstance that the offense was "especially heinous, atrocious, or cruel compared to other capital offenses." § 13A-5-49(8), Ala.Code 1975. This was the only aggravating circumstance the court instructed the jury on. Indeed, during the court's penalty-phase instructions, the court clearly instructed the jury that it could not proceed to a vote on whether to impose the death penalty unless it first found beyond a reasonable doubt the existence of at least one aggravating circumstance. (R. 1433-35.) Thus, the jury's 10-2 vote recommending death established that the jury unanimously found the existence of the "especially heinous, atrocious, or cruel" aggravating circumstance,[4] giving the trial judge the discretion to sentence Miller to death. See § 13A-5-46(e)(1)-(3), Ala.Code 1975; see also *Ex parte Slaton,* 680 So.2d 909, 927 (Ala.1996), cert. denied, 519 U.S. 1079, 117 S.Ct. 742, 136 L.Ed.2d 680 (1997); *Duke v. State,* 889 So.2d 1, opinion on return to remand, 889 So.2d 40 (Ala.Crim.App.2002).

Based on the foregoing, we conclude that Miller's claims regarding *Ring v. Arizona* are not supported by Alabama law.

VII.

[24] As required by § 13A-5-53, Ala.Code 1975, we will now address the propriety of Miller's conviction and sentence of death.

Miller was indicted and convicted of murdering two or more people "by one act or pursuant to one scheme or course of conduct." § 13A-5-40(a)(10), Ala.Code 1975. The jury by a vote of 10-2 recommended that Miller be sentenced to death.

The record reflects that Miller's sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. See § 13A-5-53(b)(1), Ala.Code 1975.

The court found one aggravating circumstance-that the murders were especially heinous, atrocious, or cruel when compared to other capital offenses, see § 13A-5-49(8), Ala.Code 1975. The trial court found the existence of three mitigating circumstances: (1) that Miller had no significant history of prior criminal activity, see § 13A-5-51(1), Ala.Code 1975; (2) that Miller committed the offense while he was under the influence of extreme mental or emotional distress, see § 13A-5-51(2), Ala.Code 1975; and (3) that the capacity of Miller to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, see § 13A-5-51(6), Ala.Code 1975. The trial court found that the aggravating circumstance outweighed the mitigating circumstances and mandated that Miller be sentenced to death.

With regard to the application of the aggravating circumstance that the murders were especially heinous, atrocious, or cruel, the trial court made detailed findings, as set out in Part V of this opinion. These findings are supported by the evidence.

Moreover, the fact that the circuit court found the existence of only one aggravating circumstance and three mitigating circumstances does not indicate that the court's decision to sentence Miller to death ***1170** was erroneous. In *Bush v. State,* 695 So.2d 70 (Ala.Crim.App.1995), aff'd, 695 So.2d 138 (Ala.), cert. denied, 522 U.S. 969, 118 S.Ct. 418, 139 L.Ed.2d 320 (1997), this Court stated:

> " '[T]he sentencing authority in Alabama, the trial judge, has unlimited discretion to consider any perceived mitigating circumstances, and he can assign appropriate weight to particular mitigating circumstances. The United States Constitution does not require that specific weights be assigned to different aggravating and mitigating circumstances. *Murry v. State,* 455 So.2d 53 (Ala.Cr.App.1983), rev'd on other grounds, 455 So.2d 72 (Ala.1984). Therefore, the trial judge is free to consider each case individually and determine whether a particular aggravating circumstance outweighs the mitigating circumstances or vice versa. *Moore v. Balkcom,* 716 F.2d 1511 (11th Cir.1983). The determination of whether the aggravating circumstances outweigh the mitigating circumstances is not a numerical one, but instead involves the gravity of the aggravation as compared to the mitigation.'
>
> "*Clisby v. State,* 456 So.2d 99, 102 (Ala.Cr.App.1983)."

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695 So.2d at 94. As the Alabama Supreme Court stated in *Ex parte* *Cook,* 369 So.2d 1251, 1257 (Ala.1978): "We can readily envision situations where several aggravating circumstances may not be sufficient to outweigh only one mitigating circumstance and, on the other hand, where numerous mitigating circumstances may be present but opposed to one aggravating circumstance so outrageous as to justify the death penalty." Accord *Carr v. State,* 640 So.2d 1064, 1074-75 (Ala.Crim.App.1994); *Magwood v. State,* 548 So.2d 512, 514 (Ala.Crim.App.), aff'd, 548 So.2d 516 (Ala.1988), cert. denied, 493 U.S. 923, 110 S.Ct. 291, 107 L.Ed.2d 271 (1989).

We find this to be the case here. The revised sentencing order indicates that the trial court considered the mitigating evidence Miller offered but determined that that mitigation was outweighed by the "heinous, atrocious, and cruel" method in which he killed three current or former coworkers simply because he believed that they were spreading rumors about him. The sentencing order shows that the court weighed the aggravating circumstance and the mitigating circumstances and correctly sentenced Miller to death. Its decision is supported by the record, and we agree with its findings.

Section 13A-5-53(b)(2), Ala.Code 1975, requires us to weigh the aggravating circumstances and the mitigating circumstances independently to determine the propriety of Miller's death sentence. After independently weighing the aggravating circumstances and the mitigating circumstances, we find that the death sentence is appropriate in this case.

As required by § 13A-5-53(b)(3), Ala.Code 1975, we must determine whether Miller's death sentence was disproportionate or excessive when compared to the penalties imposed in similar cases. Miller killed three people pursuant to a common scheme or plan. Similar crimes have been punished by death on numerous occasions. See, e.g., *Duke v. State,* 889 So.2d 1 (Ala.Crim.App.2002), opinion on return to remand, 889 So.2d 40; *Samra v. State,* 771 So.2d at 1121; *Taylor v. State,* 666 So.2d 36 (Ala.Crim.App.), opinion on return to remand, 666 So.2d 71 (Ala.Crim.App.1994), aff'd, 666 So.2d 73 (Ala.1995), cert. denied, 516 U.S. 1120, 116 S.Ct. 928, 133 L.Ed.2d 856 (1996); *Holladay v. State,* 549 So.2d 122 (Ala.Crim.App.1988), aff'd, 549 So.2d 135 (Ala.), cert. denied, ***1171** 493 U.S. 1012, 110 S.Ct. 575, 107 L.Ed.2d 569 (1989); *Siebert v. State,* 555 So.2d 772 (Ala.Crim.App.), aff'd, 555 So.2d 780 (Ala.1989), cert. denied, 497 U.S. 1032, 110 S.Ct. 3297, 111 L.Ed.2d 806 (1990).

Finally, as required by Rule 45A, Ala.R.App.P., we have searched the record for any error that may have adversely affected Miller's substantial rights and have found none. Miller's conviction and death sentence for the murders of Lee Michael Holdbrooks, Christopher S. Yancy, and Terry Lee Jarvis are due to be, and they are, hereby affirmed.

AFFIRMED.

McMILLAN, P.J., and COBB, BASCHAB, and SHAW, JJ., concur.

All Citations

913 So.2d 1148

Footnotes

1 We note that these two reports were referenced at various stages of the trial proceedings; however, the circuit clerk neglected to forward the reports to this Court as part of the certified record on appeal.

1 *Atkins* addresses the rights of mentally retarded persons sentenced to death. Nothing in the record suggests that Miller was mentally retarded. Thus, because *Atkins* had no application to this case, we did not request that the parties address the applicability of *Atkins.*

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2 Because Rule 45A, Ala.R.App.P., requires this Court to search the record for any plain error and because Miller's case was not final when *Ring* was released, we have applied *Ring* to this appeal. See *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987).

3 Section 13A-5-49, Ala.Code 1975, was amended effective September 1, 1999, to make this an aggravating circumstance. See § 13A-5-49(9), Ala.Code 1975.

4 We note that *Ring* requires only that the jury unanimously find the existence of an aggravating circumstance in order to make the defendant death-eligible. Alabama law does not require that the jury's advisory verdict be unanimous before it can recommend death. See § 13A-5-46(f), Ala.Code 1975. Nothing in *Ring* supports Miller's claim that the jury's advisory verdict be unanimous.

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11630-P

ALAN EUGENE MILLER,

Petitioner - Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: JORDAN, ROSENBAUM, and LUCK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

ORD-42

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ALAN EUGENE MILLER,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 2:13-cv-00154-KOB
	)	
KIM THOMAS, Commissioner of the Alabama Department of Corrections,	)	
	)	
Respondent.	)	

VOLUME 8

State Court – Trial Transcript

LUTHER STRANGE
ATTORNEY GENERAL

AND

THOMAS R. GOVAN, JR.
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:

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hard to tell how Lee Holdbrooks died because he is laying in a pool of blood and he does have a board in the top of the head, but we felt that it was important that you know that Lee wasn't dead when he received that last shot, that he was fighting for life when he took that last shot. So even though Mr. Johnson doesn't like that testimony and wants to be sarcastic about it, we felt it was important that you hear that, because it's important to the elements of this case.

But I wanted to present that testimony to you during this phase because I wanted it to be fresh in your mind. It's important how Lee died.

Mr. Owens, who's got a lot more experience than I do, I haven't been in this very long, pointed out that y'all will never forget that testimony. So he made the right decision in that regard.

As it should be, the state has the burden of proof in this proceeding. This thing isn't over. We've got to prove beyond a reasonable doubt during this phase of the trial the existence of an aggravating circumstance. And

we're only submitting one for your consideration. That is one that is on the law books and it says this offense is especially heinous, atrocious and cruel.

And that's our burden. You have to find the existence of an aggravating factor in order to even consider the imposition or the recommendation of the death penalty in this case. If you don't find that to be a heinous, atrocious and cruel, you automatically have to find for life without parole.

We have proven already that this offense was heinous, atrocious and cruel, we're not going to bring anyone in to tell you any more about it. You've seen the evidence and you've seen everything we have got to present.

Now, we will actually present a couple of witnesses. We have asked one member from each victims' family to come in and answer one question and it's the only question that the law allows us to ask in this phase and that is we're going to ask them to come up and stand before you and tell you how the murder of their loved one has affected the life of them and their family.

or cruel crime as compared to other capital murders.

There again, it seems obscene to me to talk about the atrocity of crimes or the heinousness of the crime.

I can't imagine any crime where a life is taken that wouldn't be cruel. I can't imagine any crime where victims don't suffer and their families don't suffer. But what you're dealing with here now is not whether a crime in and of itself is atrocious, heinous and cruel, it's whether this particular crime is extremely heinous, atrocious or cruel as compared to other capital murders.

So already you've got a relative term there. If you find unanimously that yes, this one is, then you consider mitigating circumstances. Some of them are set out in the law. I have read to Dr. Scott two of them. There is a third one, the judge will charge you that there are three mitigating circumstances that have been presented to you for your consideration. One of them has been -- at least one has been agreed upon and that is that Alan Miller has no prior criminal history. The

law considers that a mitigating circumstance.

Another one has to do -- I will have to read them because I just can't recall them. Second one if it was committed while the defendant was under the influence of extreme mental or emotional disturbance; that is a mitigating circumstance.

The rational I don't need to sit here and tell you. Greatest injustice of all is the equal treatment of unequals. If you think that you are dealing with an unequal here, don't treat them equally, the same way you would to me.

The third one of the statutory mitigating circumstances is whether capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to requirements of law which was substantially impaired.

For reasons that Dr. Scott stated to you and he can present those to you much more eloquently than I can and did. Those are three that at this point I suggest to you are unrebutted.

Now, it's not a mathematical test anyway.

Thank you.

THE COURT: Members of the jury, at this time it's my duty to relate to you the instructions and the recommendation of the sentencing.

I'll state to you at the outset that your recommendation will take the form that you do recommend to the Court and that is one form that you recommend that the Court sentence the defendant to death by electrocution.

The second one or the other one would be that you recommend to the Court that the Court sentence this man, the defendant, to life without parole or without the possibility of parole for the remainder of his natural life.

These are the two choices that you have in the event that you choose to do so.

At this time I will instruct you or charge you as to the law. In charging you, I want to remind you of the instructions that I gave you previously during the guilt stage or guilt phase of the trial, the basic laws that I've already defined for you.

The terms of reasonable doubt, of course evidence, where the evidence comes from, expert

A mitigating circumstance is any circumstance that indicates or tends to indicate that the defendant should be sentenced to life imprisonment without the possibility of parole instead of death.

The issue at this sentence hearing concerns circumstances of aggravation and circumstance of mitigation. You should consider and weigh against each other in deciding what the proper punishment in this case is.

In making a recommendation concerning what punishment should be, you must determine whether an aggravating circumstance exists; and if so, you must determine whether any mitigating circumstances exist.

In making your determination concerning the existence of aggravating and mitigating circumstances, you should consider the evidence presented at this sentence hearing. You should also consider any evidence that was presented during the guilt phase of the trial with regards to the existence of any aggravating circumstance or mitigating circumstance.

The law of this state provides a list of

aggravating circumstances which may be considered by a jury in recommending punishment, if you are convinced beyond a reasonable doubt from the evidence that one such aggravating circumstance exists in this case.

The same definition that I gave you earlier concerning reasonable doubt now applies to this matter. If the jury is not convinced to a reasonable doubt based upon the evidence that, one, that an aggravating circumstance exists, then the jury must recommend the defendant's punishment be life imprisonment without parole regardless of whether there are any mitigating circumstances in this case.

Of the list of aggravating circumstances provided by law, there is a circumstance which you may consider in this case if you are convinced beyond a reasonable doubt based upon the evidence that *such circumstance does* exist.

The fact that I instruct you on such aggravating circumstance or define it for you does not mean that such aggravating circumstance exists. Whether any aggravating

the crime apart from the norm of capital offenses.

For a capital offense to be especially cruel, it must be a consciousness or pitiless crime which is unnecessarily tortuous to the victim. All capital offenses are heinous, atrocious and cruel to some extent. What is intended to be covered by this aggravating circumstance is only those cases in which the degree of heinous, atrociousness or cruelty exceeds that which will always exist when a capital offense is committed.

Now, as I stated to you before, the burden of proof is on the State of Alabama to convince each of you beyond a reasonable doubt as to the existence of any aggravating circumstance considered by you in determining what punishment is to be recommended in this case. This means that before you can even consider recommending the defendant's punishment be death, each and every one of you must be convinced beyond a reasonable doubt based upon the evidence that an aggravating circumstance exists.

In deciding whether the state has proven

In reaching your findings concerning the aggravating and mitigating circumstances in a case and in determining what to recommend as punishment in a case, you must avoid any influence of passion, prejudice or any other arbitrary factor.

Your deliberations and verdict should be based on what you've seen and heard and the law that I've instructed you on.

There's no room for the influence of passion, prejudice or any other arbitrary factors in this case.

While it's your duty to follow the instructions which the Court has given to you, no statement, question or ruling or remark or any other expression that I made in the course of this trial either during the guilt phase or during the sentencing hearing is intended to indicate any opinion that I might have as to what the facts are or what the punishment should be. It is your sole responsibility to determine what the facts are and recommend the punishment in this case.

In doing so, you should not be influenced in any way by what you imagine to be my views

In addition to the recommendation of either death or life without parole, your verdict forms contain the numerical vote, though not the name of the person voting.

Now, if after a full and fair consideration in this case you are convinced beyond a reasonable doubt that at least one aggravating circumstance does exist, and the aggravating circumstance outweighs the mitigating circumstance or circumstances, your verdict would be as follows, of course, by this form in the event you desire to return a verdict of death. We, the jury, find the defendant, Alan Eugene Miller, be punished by death, the vote is as follows. That will be one verdict form. And I have that right here.

And you see up here on the form it has blank spots, votes for life imprisonment without parole and votes for death and you fill the blanks in there, but not the names. It's not my business which way you vote or who votes which way. This would be signed by the foreperson and dated.

However, if after a fair and full consideration of all the evidence in this case

you determine that the mitigating circumstances outweigh any aggravating circumstance that exists or that no aggravating circumstance exists or that you are not convinced beyond a reasonable doubt that at least one aggravating circumstance does in fact exist, your verdict would be to recommend life imprisonment without parole. And that would be pursuant to this other verdict form that I have right here. And it would be that we, the jury, find the defendant, Alan Eugene Miller, be punished by life imprisonment without parole and the vote would be as follows.

Again, you know, you put how many votes in there for life imprisonment without parole and then blank votes for death signed by the foreperson and dated.

Remember in each of the instances regarding returning the verdict you must follow my numerical count. And of course you can't return both verdicts. What you do in this case is what you did in the earlier part, the guilt phase, you select one of your numbers as the foreperson and that foreperson will again moderate the discussions and vote whenever it's

JUROR DONNA JOHNSON: Yes, sir, it does.

THE COURT: Does the verdict form correctly recommend the vote in this case?

JUROR DONNA JOHNSON: Yes, sir, it does.

THE COURT: Of course, did you sign that verdict form?

JUROR DONNA JOHNSON: Yes, sir, I did.

THE COURT: Would you please read the verdict form out in open court at this time.

JUROR DONNA JOHNSON: We, the jury, find the defendant, Alan Eugene Miller, be punished by death. The vote is as follows: two votes for life imprisonment without parole; ten votes for death.

THE COURT: If you would please hand that to the bailiff. I understand -- and I looked at this, that the other verdict form was not -- was left blank; is that correct?

JUROR DONNA JOHNSON: Yes, sir.

THE COURT: What I need to do is I'm not going to ask you how you voted, I'm just going to ask you at this time individually if it reflects your vote. I will begin over here at the top and begin with you. Mr. Brooks, does it reflect your vote?

JUROR WILLIAM BROOKS: Yes, sir.

THE COURT: Ms. Mire, does it reflect your vote?

JUROR GAIL MIRE: Yes.

THE COURT: Ms. Williamson, does it reflect your vote?

JUROR MALAH WILLIAMSON: Yes, sir.

THE COURT: Mr. Johnson, does it reflect your vote?

MR. GREGORY JOHNSON: Yes, sir.

THE COURT: Ms. Wood, does it reflect your vote?

JUROR JACKIE WOOD: Yes.

THE COURT: Mr. Gersh, does it reflect your vote?

JUROR BENJAMIN GERSH: Yes.

THE COURT: Mr. Hines, does it reflect your vote?

JUROR FLEETWOOD HINES: Yes.

THE COURT: Ms. Statham, does it reflect your vote?

JUROR BETTY STATHAM: Yes.

THE COURT: Mr. McGowin, does it reflect your vote?

JUROR JAMES MCGOWIN: Yes.

THE COURT: Mr. Brown, does it reflect your vote?

JUROR BOBBY BROWN: Yes.

THE COURT: Ms. Johnson, does it reflect your vote?

JUROR DONNA JOHNSON: Yes.

THE COURT: Mr. Hale, does it reflect your vote?

JUROR WARREN HALE: Yes.

THE COURT: Let the record reflect it's a unanimous verdict -- I mean, unanimous vote count. Let me see the attorneys just for one second before I excuse the jury.

(The following side bar was held outside the hearing of the jury.)

THE COURT: Before I excuse the jury, can you think of anything else we need to take up? I can't think of anything.

MR. OWENS: Nothing legal. We need to take some time and let the jury get out.

THE COURT: Yes.

(Open court. Jury present.)

THE COURT: Ladies and gentlemen of the jury, let me again thank you for participating

that cannot be done. I wish it could. I wish this had never happened.

And I will mention before I do announce my sentence that there will be no disruption in the courtroom for whichever way I do this. We will have order in the courtroom whenever this defendant is being sentenced.

This is not an easy situation. It never is. This is probably the most difficult sentence that I've ever had to consider. As *Mr. Owens said, thirty minutes*, except for that thirty minutes approximately, you had never been in trouble with the law, and I considered that as a mitigating circumstance.

And I understand further Mr. Owens mentioned about the fact that whatever you believed, that that doesn't justify going out and killing somebody.

The Court does find that there is an aggravating circumstance in this case, that it was especially heinous, atrocious or cruel compared with other capital murders.

The Court does find there is mitigating circumstances in this case. I understand you might have been suffering from some delusion,

but that didn't justify taking these three lives and taking them in the manner they were taken, and I've considered that.

I know that the jury in this case deliberated long and hard over this matter. You could see the expression over their face whenever they came back and tell how much it bothered them. And, of course, any time you hand out punishment, it bothers the judge, especially a severe one. Either way, I would hand this down, it would bother me.

But I have considered, and I've been wrestling with it for a long time, ever since you've been found guilty, and I wrestled with it again today.

It is the judgment of the Court the defendant is guilty of the capital offenses as set out in the indictment and provided under Section 13A-5-40(a)(10), being murder by the defendant of two or more persons pursuant to one scheme or course of conduct, and that punishment be fixed at death by electrocution, and that said Alan Eugene Miller, being asked by the Court if he had anything to say, that sentence will now be imposed upon him. The

defendant saying nothing, it is further ordered and considered and adjudged by the Court that the defendant, Alan Eugene Miller, is hereby sentenced to death by electrocution.

Pursuant to the Alabama Rules of Appellate Procedure 8(d)(1), the date of execution is to be set by the Alabama Supreme Court at the appropriate time.

The Court is going to suspend sentence until the time as the Alabama Supreme Court does set that time.

The Court notes that there is an automatic appeal from a death sentence heretofore imposed, and the Court does hereby find that the defendant is indigent.

It is also ordered that the trial counsel wishes to be appointed, and I will ask that trial counsel represent him on appeal, represent Mr. Miller on appeal.

MR. JOHNSON: I would prefer the Court appoint other counsel. I talked with Alan about this. And, of course, the Court understands the reason being that I need to be scrutinized as well as the facts in this case.

THE COURT: All right. I am going to

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ALAN EUGENE MILLER,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 2:13-cv-00154-KOB
	)	
KIM THOMAS, Commissioner of the Alabama Department of Corrections,	)	
	)	
Respondent.	)	

VOLUME 31

State Court – Collateral Appeal

LUTHER STRANGE
ATTORNEY GENERAL

AND

THOMAS R. GOVAN, JR.
ASSISTANT ATTORNEY GENERAL

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A. Yes. They would -- when they were little Ray and Alan would tell him to leave my mama alone. Richard, bless his heart, would run. But Ray and Alan would say leave my mom alone and he would threaten to kill them and, of course, they would run because they were small.

Q. You mentioned your parents. What was your mother's and father's relationship like with Alan?

A. My mother didn't have a relationship with Alan. She didn't like Alan. She didn't like any of my boys. My daddy liked everybody.

Q. How old -- what were -- how would she express that dislike?

A. Well when they would have a family reunion and insist I come and she wouldn't let the boys in the house. She would tell them they had to stay outside and all the other grandkids running through the house and getting something to drink and eat and messing and my kids had to sit out on the porch or out in the yard and I had to take them something to eat and to drink and to eat.

Q. So she was open about this differential treatment?

A. Oh yes. And I tried to get along with her so I could see Cheryl and Jeff.

Q. How was Ivan's father to Alan and his siblings?

A. He wasn't. He just ignored them. He never took time with them, he never -- he didn't want to buy Christmas for them. He wouldn't buy Easter for them. But he would go out and buy Easter baskets and things for his brother's kids and tell them they didn't need them, that if God wanted them to have Easter baskets they would have them. And his little sister, his younger sister, Debra, went out and bought them Easter baskets.

Q. When out and bought who Easter baskets?

A. Ray and Alan and Richard.

Q. Because his father hadn't --

A. Because Ivan wouldn't buy them, he would buy them for his nephews.

Q. Would he be open about purchasing gifts and such for other children besides them?

A. Yeah. He didn't -- he didn't care about my feelings, he didn't care about the kid's feelings.

Q. You mentioned that he was physically abusive toward you. Did he ever hit Alan and his siblings?

A. Yes. Especially Alan. Like I said he focused more on Alan because he had that stupid notion that Alan wasn't his and Alan looks like just him, bless his heart. And he hit Alan and he'd punch him, slap him, knock him, punch him. A boy came by one day -- this is

an example -- and said that Alan threw a chair at the music teacher. Well, he didn't even bother asking Alan about it. He just grabbed Alan when he came in the door and started punching him in the head and chest, in the stomach, anywhere. And one of the kids called and told me Mama, Daddy's in there punching Alan. And I run in there and they were in the hall and got between them and told him I didn't know what was going on but for him to keep his hands off of him and then he told me and I said well, you don't know that it's so. Well, I don't care.

Q. How badly were Alan and the other children harmed by these attacks?

A. Like I said Richard was scared of him. Richard -- when he started Richard would go hide. And Alan and Ray might stay there for a little bit then they would go hide too because you didn't ever know what he was going to do. He was unpredictable. He's liable to be real sweet one minute and then fly off the handle the next minute.

Q. You said he was unpredictable. You didn't know what would provoke his temper or violence?

A. You never knew. He thought people were after him, people were trying to hurt him, people were plotting against him, that we were plotting against him and I was trying to poison him. All kinds of things.

Crazy things.

Q. Did he ever blame Alan and the boys for things that were completely out of control, had nothing to do with them?

A. Yes. My daughter, Lisa, their youngest sister had appendicitis and the night she was operated on he went home and started beating on the kids, more so Alan they said but I wasn't there, but more so Alan because it was his fault that Lisa had appendicitis. And you don't cause appendicitis. It just happens.

Q. Did Ivan regularly beat Alan? Did Ivan beat Alan and the other children?

A. Yes. Every time he turned around. Anything -- one of the kids, especially Lisa, could do something but he would whup Alan for it because, I hate to stay it, but my daughter is a spoiled brat and was.

Q. Did you do anything to stop Ivan?

A. I would get between them and then get the heck beat out of me. But that didn't really matter. I didn't want him hurting my kids.

Q. Did you ever call the police?

A. No.

Q. Why not?

A. Because they wouldn't do anything to him. Maybe keep him overnight and then come home the next day and

then it would be ten times worse.

Q. Did Ivan continue physically threatening Alan as he got older?

A. Yes, until Alan got to be a teenageer -- well, he threatened him when he was a teenager.

Q. Did he ever threaten Alan with a weapon?

A. He threatened him with a knife, he threatened him with a gun, he said was going to shoot him. He got mad one day and said he didn't know which one of us he wanted to kill and he started shooting the baseboards in the house. And he emptied the gun in the baseboards.

Q. He fired a gun off in the house?

A. Into the baseboard, he emptied it in the baseboard of my house. Then another time he shot in the wall of the house a few times. But he would sit and play with a gun and say I don't know if I want to kill y'all now or wait a while. You never knew if the gun was loaded or not because I didn't know anything about guns.

Q. You mentioned him knocking over furniture, can you think of any examples of that?

A. He threw a coffee table up and broke it one time. Then he threw it up and and it landed on his toe and made -- I made the mistake of laughing about it and got beat on for that. Then he threw the dinner table up

forgotten that one.

Q. When you lived with Ivan did he hold a steady job?

A. No. It wasn't unusual for us to have 10 or 12 W2 forms to file on tax filing day.

Q. Now, why was he in and out of jobs so much?

A. He'd get mad at somebody and quit work. He thought they were plotting against him or just wasn't treating him right and he'd get up and quit.

Q. So he wasn't always fired by these jobs?

A. No. I don't know that he either really got fired except one time, that was a truck. He left -- something happened to him and he just left the truck in the middle of the highway and got out and left it there with the keys in it.

Q. Was he a truck driver?

A. Yes.

Q. And so on one of his routes he left the truck with the keys in it?

A. Yes.

Q. Why did he do that?

A. I don't really know.

MS. COKER: We object.

A. Somebody said something to him and he just got mad about it.

MS. COKER: Just going to object, Your Honor, to -- we understand the leeway of what's going on here with relevance of different situations here with Mr. Miller's father, Mr. Miller. We just object to the relevance.

THE COURT: You may continue.

BY MS. SEGURA:

Q. Did Ivan provide any financial assistance in the family?

A. Some. I worked sporadically when I could but I couldn't keep a job because he would call me a hundred times a day or he would come by and harass me and accuse me of having an affair with people that I worked with.

Q. Did he ever take the household expenses or money for himself?

A. Yes.

Q. What would he do with that money?

A. Sometimes he would give it to the preacher and sometimes he would go by drugs.

Q. Now, did Ivan ever take things around the house and sell them at pawn shops or --

A. Anything we had that was of value which really wasn't a whole lot of anything he would buy me something and then go sell it. He would say I bought this for you but he would turn around -- in my name I will go sell

it. He sold my car to go buy drugs.

Q. So how did the family get by financially aside from your sporadic working sprees?

A. We lived off food stamps. If it hadn't been for that we would have went hungry.

Q. Did he ever discourage you from working?

A. Yes. Because, I mean, you couldn't work from somebody calling you all day long if you were by a phone or coming by just being a nusience. You know people won't put up with that at a job.

Q. Now where did the family live for the first 18 years of Alan's life?

A. All over. Between here and Chicago and we moved to Texas. Alan might have been 18 then.

Q. How many times do you approximate that you moved during that time?

A. Probably 18 or 20 times.

Q. Why did the family move so often?

A. He quit his job and then he wanted to go to Chicago. I can go stay with my sister -- we can stay with my sister and I can get a job there because everybody can get a job in Chicago which at the time you could.

Q. Now when you say he --

A. Ivan

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Q. Now when you say he --

A. Ivan

involved in legal trouble or committed crimes?

A. His brothers. Both his brothers spent time in prison. One went to prison, I don't know how many years, but he straightened up when we got out.

Q. Can you name who those brothers where?

A. Hubert was the one that went for armed robbery when he was about 16. I don't know how many years he spent. He spent it at Draper. And he got out and straightened up. Jim went for armed robbery. He went to Draper. But Jim had been in trouble in juvenile all his life. He's still in prison now. He's been in and out all his life.

Q. What's Jim in jail now for?

A. Murder, I think. I'm not sure.

Q. Anyone else?

A. I haven't had any contact with them. And Terry, his youngest brother.

Q. Were these men around Alan much growing up?

A. Yes.

Q. Were you worried having these men around your children?

A. Well I stayed around to protect -- you know, to be there so they didn't do anything crazy.

Q. Why were you worried?

A. They were on drugs and drinking and you don't

know -- you don't know what people are going to do when they are doing that.

Q. So they didn't modify their behavior around your kids, they wouldn't refrain from cursing or doing drugs?

A. No.

Q. Was Alan close to his siblings?

A. Yes. He was close to all of them especially Ivan Ray, Ray, Ray Jr.

Q. He was especially close to Ivan Ray. Now, Ivan Ray is older than Alan, right?

A. Yes.

Q. Ray passed away, didn't he?

A. Yes.

Q. What was the cause of Ray's death?

A. He was killed in a car accident and I was injured in the same accident.

Q. How did that impact Alan and your family?

A. Badly. Alan more so because he ended up having to do the funeral arrangements because his daddy said he was going to go do it but he didn't. And it was left up to Alan -- well, he and Cheryl went to see what kind of arrangements were made and he ended up having to make them. I was still in the hospital.

Q. What year was this? What year did Ray die?

A. '91.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ALAN EUGENE MILLER,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 2:13-cv-00154-KOB
	)	
KIM THOMAS, Commissioner of the Alabama Department of Corrections,	)	
	)	
Respondent.	)	

VOLUME 32

State Court – Collateral Appeal

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around that.

Q. And who are you referring to by them?

A. Lucy and George Carr.

Q. Was Ivan a religious man?

A. Half and half. He would be religious on Sunday and then sin Monday through Saturday.

Q. Can you explain what you mean by sin?

A. Drink, smoke, cuss, you know, do drugs, smoke marijuana.

Q. Have you ever seen him do drugs?

A. I've seen him smoke marijuana.

Q. How did you know it was marijuana?

A. You could tell by the smell.

Q. Would anyone else be around when you saw him doing this?

A. Oh, everybody would. I would be -- and I refer to the kids as Ivan Ray and Alan and Richard and Lisa.

Q. Where would he smoke marijuana?

A. In the house, just whatever room he just happened to be in at the time.

Q. Did he ever appear to try and hide it from the kids?

A. No.

Q. What else, if anything, have you seen Ivan do that appeared inconsistent with his religion?

A. Well, he would beat up on the children. I refer to -- not Lisa, but the boys, the three boys. Because he would hit them and punch them and tell them how stupid they were and they were ignorant.

Q. How often would you observe this?

A. Probably about every time I was over there and that was like maybe once a week. That was when I got older and got to working in Birmingham I would go by because I didn't have anything to do during the week and I would go by and visit.

Q. Did you see Ivan treat Alan any differently than his brothers?

A. He was probably harder on Alan than he was any of the others.

Q. Now focusing on the Miller children were you close to any of the Miller children?

A. Yes.

Q. Who?

A. In the order would be Ivan Ray and then Alan and now Richard.

Q. Have you ever lived with any of the Miller children?

A. They lived with me.

Q. Who did?

A. Ivan Ray did for a while. They were -- Barbara

Q. But while you were grown your father was around Alan some?

A. When I was grown?

Q. Uh-huh. After the 17, 18 year old?

A. Yes. Not much, but just occasionally. He didn't hunt like I did.

Q. But he was around the two of you when you were together?

A. Yeah.

Q. And you say your father would have been a good influence on Alan?

A. Absolutely. He was a good influence on me.

Q. Now, how about your contact with Alan now? Are you in touch with him now?

A. No. I haven't been.

Q. You write him at all?

A. No. I don't write anybody.

Q. Have you been to visit him in Holman since he's been down there?

A. No.

MS. COKER: No further questions.

THE COURT: Any redirect?

MR. BARTOLIC: No redirect, Your Honor.

THE COURT: Witness may step down. Thank you, sir.

RICHARD WILLIAM MILLER,

Was duly sworn and testified as follows:

DIRECT EXAMINATION

BY MS. SEGURA:

Q. Good morning.

A. Good morning.

Q. Can you please state your name for the record?

A. Richard William Miller.

Q. When were you born?

A. 11-26-65.

Q. So Alan is older than you?

A. Yes, ma'am, by ten months.

Q. Who are your parents?

A. Barbara and Ivan Miller.

Q. And these are the same parents as Alan, correct?

A. Yes, ma'am.

Q. Did you grow up in the same home as Alan?

A. Yes, ma'am.

Q. Can you describe your childhood growing up?

A. Very violent and just terrible.

Q. Can you describe your mother?

A. Very loving, always carrying, always take up for us.

Q. Can you describe your father?

A. Very mean, a bully, very violent man.

Q. Can you -- now you mentioned your mother was always sticking up for you?

A. Yes, ma'am.

Q. Against whom?

A. My father.

Q. Did you ever witness your father interacting with Alan as you were growing up?

A. Very little.

Q. Did you ever see how he -- did you ever witness how he treated Alan while you were growing up?

A. He treated Alan kind of worse than all of us.

Q. What are examples of that?

A. He would yell at him more and call him more names than he would everybody else.

Q. What kind of names?

A. Bastard and -- pardon my language but bastard and idiot and moron and about any name that you can call somebody.

Q. Did you witness your father hitting Alan or beating on Alan?

A. Yes, ma'am.

Q. Can you describe what your father would do to him?

A. Slap him, kick him, sometimes punch him.

Q. What would -- what would your mother do during --

Q. They would just do it in front of you?
A. Yes, ma'am. Just say keep your mouth shut.
Q. Would you characterize your father as a paranoid person?
A. Yes, ma'am.
Q. Can you give some examples of that?
A. He would always think somebody was talking about them, somebody had his job, was trying to get his job or that people was looking for him at all times and stuff like that.
Q. Did you and your brothers make friends in school?
A. He tried to but we moved around so much you really couldn't.
Q. How often did you think you moved as a child?
A. I'd say nine to 12 times.
Q. So you went to a lot of different schools?
A. Yes, ma'am.
Q. Did you ever witness Alan being made fun of in school?
A. Yes, ma'am, they made fun of his clothes, they used to call him tank head because we didn't have good clothes but my mother would wash them and stuff. But we were poor.
Q. Did they make fun of you in that way too?
A. Yes, ma'am.

Q. How would you describe Alan as a person?
A. He was a good person.
Q. How would you describe him as a brother?
A. He was a good brother.
Q. What was he like as an uncle to his nephews and nieces?
A. Very loving. He'd buy them happy meals and when they would come down take them four wheeling and fishing.
Q. Who were your nephews and nieces that he would do these things for?
A. Alicia, Christy and Junior and Jake and Jordan and Kelly.
Q. Now, who are the -- these are the children of your brothers and sisters. Which brothers and sisters?
A. Lisa has -- my sister Lisa has Alicia, Christy and Junior. Cheryl has Jake and Jordan and Jeff has Kelly.
Q. Now, your brother Jeff didn't live with you at this point?
A. Oh, no, ma'am. He was on his own.
Q. Would he leave his daughter in Alan's care?
A. Oh, yes, ma'am. All of them.
Q. And this was just for a full day he would leave --

MR. HENRY JOHNSON: Objection, Your Honor. I don't recall any such testimony.

MR. WHITEHEAD: Judge, we've never heard it before it came out in court here today. So I can assure you the record will reflect --

MR. HENRY MILLER: Withdraw.

BY MR. WHITEHEAD:

Q. Now, were there any references to -- these are the records of Hubert Miller. Am I correct that he is the father of Ivan Ray Miller?

A. Correct.

Q. And Ivan Ray Miller is the father of the defendant Alan Miller; is that correct?

A. Yes.

Q. And were there any references to Alan's father Ivan Ray Miller in his father Hubert's Bryce file?

A. Yes.

Q. Would you look with me please at Exhibit 33 page 0114? Do you have that, Doctor?

A. Yes.

Q. And what is this document?

A. This is a letter written by Hubert Miller's wife to someone at Bryce. It says dear sir.

Q. Did you find a place in that letter in which Hubert Miller's wife and Ivan Miller's father -- excuse

me, Ivan Miller's mother makes reference to her son, Ivan?

A. Yes.

Q. Would you just briefly read the sentence or two that says --

A. It actually looks like its to Dr. Tarwater it looks like. "I am writing to you to let you know that my son Ivan Ray Miller said that he was going to come down there and check his daddy outside and leave with him. Dr. Tarwater my son is not normal. He act very much like his Daddy so please be careful about letting him check his daddy out."

Q. Now, do you recall earlier when you testified that you reviewed the mental health records of Alan's uncle Perry Miller?

A. That's correct.

Q. What did you learn about the mental health history to Alan's uncle Perry Miller?

A. That he had a history of mental health treatment and had evaluations through social security and was diagnosed at one point with bipolar disorder and I believe may have also been diagnosed with depression.

Q. Let's just look very quickly at a couple of documents that establish this. Do you have Exhibit 36 in front of you? No, you do not. It's right here.

This is in evidence as Perry Miller's medical file and mental health file. Look at the very first page, Exhibit 36-0001.

A. All right.

Q. Am I correct that this is a May 3rd 1993 comprehensive psychological evaluation of Mr. Perry Miller?

A. Correct.

Q. And if you turn with me to the fourth page of that letter which is Exhibit 36-0004 am I correct that the -- the Gerald K. Anderson PhD, a clinical psychogist, gives his diagnostic impressions of Perry Miller?

A. Yes.

Q. His diagnoses. Now, does this 1993 evaluation make reference to the mental health issues and history of violence of other members of the Miller family?

A. In the body of the letter?

Q. Yes.

A. Yes.

Q. Draw your attention again back to the first page. And you see the discussion about his family mental health history and history of violence at the very bottom of the second paragraph on the first page?

A. That's correct.

MR. WHITEHEAD: Judge, you read it for yourself later on. It's in evidence. I just wanted to bring it -- highlight the documents that we're particularly relying upon.

BY MR. WHITEHEAD:

Q. Now, did Perry Miller receive any subsequent psychological evaluations after this one in May of 1993?

A. Yes.

Q. Is one reflected on Exhibit 36 at page 0005?

A. Yes.

Q. And am I correct that that is the -- again a comprehensive psychological evaluation dated December 15, 1995 by a William B. Beidleman, B-e-i-d-l-e-m-a-n, PhD?

A. Yes.

Q. And am I correct that if you went to Exhibit 36-0008 you will find Dr. Beidleman's diagnoses?

A. 09?

Q. Thank you. Actually it starts at the bottom of 08.

A. Yes.

Q. It talks about the diagnostic impression for Mr. Miller?

A. Yes.

Q. And do you recall if there were any other

this at this point?

MR. WHITEHEAD: No, we are not, counsel. If you may please let me finish. I simply was going to suggest to Your Honor that there are two appellate court decisions sited in the memorandum that I think might be of assistance to Your Honor.

THE COURT: Then we will take some further look at it. Thank you. And I hope that at least our discussion will be fruitful and you will understand what I am wrestling with and give you an opportunity to respond to that.

MR. WHITEHEAD: It is always helpful to us to know what you are thinking.

(Lunch recess taken.)

BY MR. WHITEHEAD:

Q. Dr. Boyer, prior to the break for lunch we were talking about what you had learned from the records and the family interviews concerning some of Alan's relatives. And we talked about Perry and Uncle James. What did you learn from your review of the records from your interviews with the family concerning Alan's father Ivan Ray Miller?

A. Ivan Ray Miller did have a couple of criminal offenses that I found in records there, I believe a theft and larceny. He, in terms of, you know -- are you

taking about all the information that I gathered in total?

Q. Did you learn anything about any psychiatric record or mental health record for Ivan Ray?

A. Of Ivan Ray Miller?

Q. Do you recall whether or not he had seen a psychiatrist at the Cooper Green Hospital?

MR. HENRY JOHNSON: Your Honor, just for clarification are we talking about Ivan Miller or Ivan Ray Miller his son?

MR. WHITEHEAD:

Q. I beg your pardon. We are talking about the senior, Alan Miller's father. Thank you.

A. Yes. He did have a history of treatment for depression in particular as far as mental health records.

Q. Now were there any -- was there any information of importance that you learned from the divorce file concerning the marriage of Ivan and Barbara Miller concerning Ivan's activities?

A. Yes, that violence was a factor that was sited in the reason for the divorce or abuse.

Q. Am I correct that Barbara applied for a protective order based on the violence that she had suffered from Ivan?

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ALAN EUGENE MILLER,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 2:13-cv-00154-KOB
	)	
KIM THOMAS, Commissioner of the Alabama Department of Corrections,	)	
	)	
Respondent.	)	

VOLUME 33

State Court – Collateral Appeal

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VOL. 15

COURT OF CRIMINAL APPEALS NO. CR-08-1413

APPEAL TO ALABAMA COURT OF CRIMINAL APPEALS

FROM

CIRCUIT COURT OF Shelby COUNTY, ALABAMA

CIRCUIT COURT NO CC-1999-792.60

CIRCUIT JUDGE Dan Reeves

Type of Conviction/ Order Appealed From: Rule 32 Petition

Sentence Imposed: Petition Denied

Defendant Indigent: ☑ YES ☐ NO

Alan Eugene Miller

NAME OF APPELLANT

Robin Ann Adams

(Appellant's Attorney) (Telephone No.)

1901 6th Ave No Ste 2400

(Address)

Birmngham, AL 35203

(City) (State) (Zip Code)

V.

State of Alabama

NAME OF APPELLEE

(State represented by Attorney General)

NOTE: If municipal appeal, indicate above, and enter name and address of municipal attorney below.

df

(For Court of Criminal Appeals Use Only)

certainly had some conduct problems at times. Those were not specified. And that at times his grades were quite variable. He might go during grading period from an A to a D for example. And one of the things that you often see in the school histories of children who have a lot of disruption in the home life is that kind of variability.

Q. You reviewed Alan's employment records that were marked into evidence earlier?

A. Yes.

Q. What do you recall learning about Alan's work performance and employment history from the records and from the other interviews you conducted?

A. In general that it was good, that he was considered to be a good worker. He did have -- I do recall reading about a fight and if you are asking about sort of what I learned more broadly than just the records and it sounds like you did, that work was something that was very important to him, that he valued, he wanted to be a responsible person who was not like his father.

Q. Do you recall learning anything about his job performance at his most recent position in Ferguson Enterprises the months just before the shooting?

A. Yes. There was a good report I believe that he

had recently gotten a raise and was described as a good worker.

Q. Now, you told us about your interviews with Alan and his family members. What did you learn from those interviews with respect to Alan's upbringing?

A. Certainly one of the things that stands out prominently and has been described by other witnesses is the level of abuse that was present in the family from Alan's father that it was frequent, that it ranged from actual physical assaults to threats with guns and knives to the point of shooting into the floor, shooting into the wall, threats to harm, threats to kill the family, intimidating, bullying, that kind of thing. There is this element of unpredictability where he seemed that his moods would suddenly shift. There were periods that we would get on religion and, you know, go around preaching or anointing people or trying to heal people that seemed sort of bazar in terms of the standards of that family, that this was not what they were accustomed to in terms of religious practices. They seemed very erratic in terms of his work history, his jobs. He was not consistent -- consistently employed or providing for the family financially.

Q. I'm sorry. I interrupted. Go ahead.

A. I was just going to go through the list of things

I learned about the family unless you want to --

Q. No. Go ahead.

A. The family was certainly often in severe financial stress in terms of the types of places they lived or needed to stay from time to time with a relative. There were frequent moves which certainly uprooted the kids from one school to another or one location to another.

Q. What did -- what in particular did you learn about the frequency or the nature of the physical abuse that Alan received from his father, Ivan?

A. That it was sort of a regular thing in the family. It's not something that happened once a year or once every few years, that it was weekly often. When I asked Alan how often that he could tell me how many times his father actually hit him with his fists he said at least a thousand times. It was just so much a part of the routine that you could walk by and he suddenly reached out and just punch you for no reason. But it's -- it was a feature of -- I wouldn't say day-to-day life but it was certainly a regular feature of life in that family.

Q. What did you learn as a result of this abuse, the nature of the relationship between Alan and his father?

A. That it was very, very poor. He was afraid of

him. He believed that his father could potentially kill him and other people in the family. So there was a great deal of fear and anxiety and helplessness about, you know, being stuck in that situation.

Q. How did Alan cope with this?

A. Well physically in terms of, you know, how could he respond to it. There wasn't a lot, from my understanding, that he was able to do. When he got to a certain point in life and as he got older and bigger my understanding is that the level of physical abuse changed up when he became in his late teens there was not the kind of threats or beatings that he had when he was younger.

Psychologically he has talked about what we call dissociation, meaning he remembers times when his father would beat him and his conscious awareness of what was going on was not there. He would sort of come to himself and find that he was, you know, sore in his ribs or had bruises and couldn't remember how it happened. He sort of has the sense of mentally going away, going elsewhere sometimes during the abuse. It didn't always happen, but it did happen at times. So that was one way that psychologically he dealt with it and we know that's common when people are exposed to abuse and trauma.

Otherwise he was in another aspect of him that is

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

ALAN EUGENE MILLER,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 2:13-cv-00154-KOB
	)	
KIM THOMAS, Commissioner of the Alabama Department of Corrections,	)	
	)	
Respondent.	)	

VOLUME 43

Opinions

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IN THE SUPREME COURT OF ALABAMA

Daniel 18815

May 27, 2005

1040564

Ex parte Alan E. Miller. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Alan Eugene Miller v. State of Alabama) (Shelby Circuit Court: CC99-792; Criminal Appeals : CR-99-2282).

CERTIFICATE OF JUDGMENT

Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

SEE, J. - Nabers, C.J., and Lyons, Harwood, Woodall, Stuart, Bolin, and Parker, JJ., concur. Smith, J., not sitting.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this *27th* **day of** *May,* *2005*

Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

/bb

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

RECEIVED AND FILED
MARY H HARRIS
MAY 05 2009
CIRCUIT & DISTRICT
COURT CLERK
SHELBY CO.

ALAN EUGENE MILLER,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. CC-99-792.60
	)	
STATE OF ALABAMA,	)	
	)	
Respondent.	)	

FINAL ORDER DENYING PETITIONER ALAN EUGENE MILLER'S AMENDED RULE 32 PETITION FOR POST-CONVICTION RELIEF

In a previous order on July 31, 2007, this Court summarily dismissed all claims raised in Miller's amended petition, with the exception of claim I(B) - that Miller was denied effective assistance of appellate counsel. Having thoroughly reviewed and considered Petitioner Alan Miller's amended Rule 32 petition, the evidence that was presented during the evidentiary hearing concerning his amended petition on February 11-14, 2008 and on August 6, 2008, the evidence that was presented at Miller's capital murder trial, the record on direct appeal, and all of the other pleadings that were filed in the above-styled cause, this Court makes the following findings of facts and conclusions of law and hereby DENIES all relief on Miller's amended Rule 32 petition.

STATEMENT OF THE CASE

On August 13, 1999, Miller was indicted for the capital murder of Lee Holdbrooks, Christopher Yancy, and Terry Jarvis, pursuant to one scheme or common course of conduct under Ala. Code § 13A-5-40(a)(10). (C. 18)[1] Mr. Rodger Bass and Mr. Mickey Johnson were appointed to represent Miller for trial. (C. 12) Miller, through counsel, pleaded not guilty by reason of mental disease or defect. (C. 1)

Based on Miller's plea, the trial court ordered that Miller undergo a mental examination conducted by the Alabama Department of Mental Health and Mental Retardation. (C. 19) Miller was examined by Dr. James Hooper, a psychologist at Taylor Hardin medical facility on October 4, 1999. (Rule 32 R. 65) After his examination, Dr. Hooper issued a report stating that Miller was competent to stand trial and did not meet the standard for insanity under Alabama law. (Petitioner's Ex. 29-0206-0211) Miller was also examined by a psychologist retained on behalf of the

[1] References to the record shall appear as follows: "R." shall refer to the court reporter's transcript of Miller's trial; "R2." Shall refer to the court reporter's transcript of the hearing on Miller's Motion for New Trial; "C." shall refer to the clerk's record on direct appeal; "M.H." shall refer to the hearing on the State's motion to dismiss Miller's amended petition held on June 25, 2007; "Rule 32 R." shall refer to the record of the evidentiary hearing that was held on February 11-14, 2008; "Rule 32 R2." shall refer to the evidentiary hearing that was held on August 6, 2008.

State of Alabama, Dr. Harry McClaren, who also determined that Miller did not meet the requirements of insanity at the time of the offense under Alabama law. (Rule 32 R. 773, 780)

On March 16, 2000, Miller's trial counsel filed an application for funds for expert psychiatric assistance in support of Miller's defense, which was granted by the trial court on April 4, 2000. (C. 50-55, 57) Trial counsel then retained a psychiatrist, Dr. Charles Scott, to conduct evaluations of Miller to determine whether Miller qualified for the insanity plea. (Rule 32 R. 48) However, after an extensive investigation which included document gathering, interviews of Miller's family members, and a three day evaluation of Miller, Dr. Scott concluded that Miller did not meet the definition of insanity under Alabama law. (Petitioner's Ex. 29-0000-0021)

After consultation with Dr. Scott, trial counsel withdrew the not guilty by reason of mental defect plea and entered a plea of not guilty. (Rule 32 R. 91-92) On June 5, 2000, Rodger Bass filed a Motion to Withdraw from his representation of Miller and Mr. Ronnie Blackwood was appointed to represent Miller in Bass' place. (C. 4, 61-63)

Miller's trial began on June 12, 2000. After hearing all the evidence presented at trial, the jury found Miller guilty of capital murder under Ala. Code § 13A-5-40(a)(10). (C. 73) The trial then proceeded to the penalty phase in which the jury recommend by a vote of 10-2 that Miller should be sentenced to death. (C. 74) The trial court then ordered the compilation of a pre-sentence report and conducted a sentencing hearing, after which the trial court upheld the recommendation of the jury and sentenced Miller to death. (C. 89) The trial court then issued specific written findings of fact in which it found the aggravating circumstance that the capital murder was especially heinous, atrocious, and cruel to exist. (C. 98-104)

On August 2, 2000, Mr. Billy Hill and Mr. Haran Lowe were appointed as appellate counsel for Miller after Johnson and Blackwood withdrew. (Rule 32 R2. 9) Miller, through counsel filed a motion for new trial, which was later amended to include numerous claims, including ineffective assistance of trial counsel. (C. 93-97) Appellate counsel then sought and obtained a continuance of the hearing on the motion for new trial so that the transcript of Miller's trial could be completed. (C. 108)

The trial court conducted hearings on Miller's motion for new trial on December 7, 2000 and January 31, 2000. During the hearings, appellate counsel presented the testimony of trial counsel Mickey Johnson, psychologist Dr. Bob Wendorf, and Mr. Aaron McCall of the Alabama Prison Project in support of the ineffective assistance of trial claim. (R2. 4-174) On February 21, 2001, the trial court denied Miller's motion for new trial. (C. 7)

On direct appeal, the Court of Criminal Appeals initially remanded Miller's case to the trial court for two reasons: 1) to enter specific written findings of fact regarding the claims raised in Miller's motion for new trial and 2) to enter specific written findings of fact regarding the existence of the aggravating circumstance that the capital murder was especially heinous, atrocious, and cruel. Miller v. State, 913 So. 2d 1148, 1153 (Ala. Crim. App. 2004). On return from remand, the Court of Criminal Appeals affirmed both Miller's conviction and sentence of death and affirmed that the trial court's written findings that the aggravating circumstance under Ala. Code § 13A-5-40(a)(10) and that three statutory mitigating circumstances existed under Ala. Code § 13A-5-

51(a)(1), (2), and (6). Miller, 913 So. 2d at 1169. Miller's petition for writ of certiorari in the Alabama Supreme Court was denied on May 27, 2005. The United States Supreme Court denied Miller's petition for writ of certiorari on January 9, 2006. Miller v. Alabama, 546 U.S. 1097 (2006).

The instant post-conviction proceeding began on May 19, 2006 when Miller, through counsel, filed his "Petition for Relief from Judgment Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure". The State of Alabama answered Miller's petition on August 18, 2006. Miller filed his "First Amended Petition for Relief from Judgment Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure" on April 4, 2007, the current petition before this Court's consideration. The State answered Miller's amended petition and moved to dismiss the claims in Miller's petition on April 17, 2007.

On June 25, 2007, this Court held a hearing on the State's motion to dismiss. (M.H. 2-103) After the hearing, this Court issued an order summarily dismissing Miller's ineffective assistance of trial counsel claim (Claim I(A)), his claim that his death sentence violated Ring v. Arizona,

536 U.S. 584 (2002) (Claim II), and his claim that lethal injection was unconstitutional (Claim III). (See Appendix A) In its order, the trial court also determined that Miller's claim that the prosecution withheld evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963) (Claim IV) and Miller's juror misconduct claim (Claim V) had not been pleaded with specificity. The trial court ordered that Claims IV and V be summarily dismissed unless Miller amended such claims within 60 days. (See Appendix A) The only remaining claim not dismissed by this Court's order was Miller's claim of ineffective assistance of appellate counsel. (Claim I(B)).

On February 11-14, 2008, an evidentiary hearing was held before this Court on Miller's only remaining claim of ineffective assistance of appellate counsel. The evidentiary hearing was then continued and completed on August 6, 2008.

SUMMARILY DISMISSED CLAIMS

The following claims in Miller's amended petition were summarily dismissed by this Court's in its previous order of July 31, 2007:

I(A). Miller's Ineffective Assistance Of Trial Counsel Claims Are Procedurally Barred From Review.

In Issue I(A) of his amended petition, Miller raises a number of claims alleging that his trial counsel were ineffective during the guilt and penalty phases of his trial. (Pet. at 4-83) As this Court previously ruled in its July 31, 2007 order, Miller's ineffective assistance of trial counsel claims are procedurally barred from review, under Rule 32.2(a) of the Alabama Rules of Criminal Procedure, because they were or could have been, but were not raised at trial or on appeal. (See Appendix A)

Rule 32.2(a) of the Alabama Rules of Criminal Procedure provides, in pertinent part, as follows:

> The petitioner will not be given relief under this rule based upon any ground:
>
> *****
>
> (2) Which was raised or addressed at trial; or
>
> (3) Which could have been but was not raised at trial, unless the ground for relief arises under Rule 32.1(b); or
>
> (4) Which was raised or addressed on appeal or in any previous collateral proceeding; or,
>
> (5) Which could have been but was not raised on appeal, unless the ground for relief arises under Rule 32.1(b).

Ala. R. Crim. P. 32.2(a). Accordingly, Miller's ineffective assistance of trial counsel claims are summarily dismissed, under Rule 32.7(d) of the Alabama Rules of Criminal Procedure.

In Ex parte Jackson, 598 So. 2d 895 (Ala. 1992), the Supreme Court of Alabama created a mechanism through which newly appointed appellate attorneys could raise ineffective assistance of trial counsel claims in a motion for new trial and on appeal. In particular, the court created an exception to the requirement, set forth in Rule 24.1(b) of the Alabama Rules of Criminal Procedure, that a motion for new trial must be filed "no later than thirty (30) days after sentence is pronounced." Id. at 897. The exception provided that a newly appointed appellate attorney could file a motion, within fourteen days of being appointed, to extend the 30-day time period for filing the motion for new trial. Id. Once that motion, known as a "Jackson motion," was filed, the attorney automatically would have thirty days "from the date the reporter's transcript is filed" to file a motion for new trial. Id. The court reasoned that this exception was necessary because it would enable new

counsel to raise "all appropriate issues before the trial court," including claims alleging that the defendant's trial counsel were ineffective. Id. at 897-898.

Acknowledging that the Jackson mechanism had created more problems in practical application than it solved, the Supreme Court of Alabama, in Ex parte Ingram, 675 So. 2d 863, 865 (Ala. 1996), overruled Jackson only "to the extent that it allows newly appointed appellate counsel to move to suspend the Rule 24.1(b), Ala. R. Crim. P., 30-day jurisdictional time limit for new trial motions." The court did, however, strongly encourage trial judges "to attempt to facilitate newly appointed appellate counsel's efforts to make new trial motions based upon an alleged lack of effective counsel before the Rule 24.1(b) time limit expires." Id. Because the court overruled Jackson only to the extent that it permitted a newly appointed attorney to move to suspend the Rule 24.1(b) time limit for filing a motion for new trial, the court, in Ingram, left intact Jackson's holding that the "[f]ailure to include a *reasonably ascertainable issue* in a motion for new trial will result in a bar to further argument of the issue on

appeal and in post-conviction proceedings." Jackson, 598 So. 2d at 897 (emphasis added).

After the Supreme Court of Alabama issued its decision in Ingram, the court amended Rule 32 of the Alabama Rules of Criminal Procedure by adopting Rule 32.2(d). That rule was adopted to address claims of ineffective assistance of counsel. Rule 32.2(d) of the Alabama Rules of Criminal Procedure provides that, "Any claim that counsel was ineffective must be raised as soon as practicable, either at trial, on direct appeal, or in the first Rule 32 petition, whichever is applicable." See V.R. v. State, 852 So. 2d 194, 199 n.1 (Ala. Crim. App. 2002).

In Russell v. State, 886 So. 2d 123, 125-126 (Ala. Crim. App. 2003), the Alabama Court of Criminal Appeals held that the appellant's ineffective assistance of trial counsel claims were procedurally barred from review, under Rules 32.2(a) of the Alabama Rules of Criminal Procedure, because they reasonably could have been presented in a motion for new trial and on direct appeal. In reaching that result, the court held that a Rule 32 petitioner's ineffective assistance of trial counsel claims will be procedurally barred from review if the transcript of the

trial was prepared in time for appellate counsel to raise those claims in a timely filed motion for new trial. Id. at 126. Cf. V.R., 852 So. 2d at 202 ("[A] defendant is not precluded ... from raising an ineffective assistance of trial counsel claim for the first time in a Rule 32 petition if the trial transcript was not prepared in time for appellate counsel to have reviewed the transcript to ascertain whether such a claim was viable and to present the claim in a timely filed motion for a new trial.").

In short, Alabama law provides that a defendant must raise ineffective assistance of trial counsel claims as soon as "practicable." See Ala. R. Crim. P. 32.2(d). In addition, a Rule 32 petitioner's ineffective assistance of trial counsel claims will be procedurally barred from review, under Rule 32.2(a) of the Alabama Rules of Criminal Procedure, if newly appointed appellate counsel had the trial transcript and raised (or reasonably could have raised) ineffective assistance of trial counsel claims in the trial court. That is *precisely* what occurred here.

On July 31, 2000, the trial court sentenced Miller to death. (C. 90) During the sentencing hearing, the trial court stated that new counsel would be appointed for

Miller's appeal. (R. 1473-74) Mr. William R. Hill, Jr. and Mr. J. Haran Lowe, Jr. ("appellate counsel") were subsequently appointed and filed a motion for new trial on or about August 1, 2000. (C. 93-94) In addition, appellate counsel filed a "Motion for The State of Alabama to Provide Transcript of Record." (C. 91-92) On August 25, 2000, appellate counsel filed an amended motion for new trial alleging various claims including a claim that Miller's due process rights were violated because of the ineffectiveness of trial counsel. (C. 7, 95-97) On August 30, 2000, the trial court granted a joint motion to continue the hearing on Miller's motion for new trial until October 13, 2000 in order for the transcript of Miller's trial to be completed. (C. 108-10) After the trial court granted Miller funds for expert assistance, the hearing on the motion for new trial was again continued until December 7, 2000. (C. 7, 132)

The trial court conducted hearings on Miller's motion for new trial on December 7, 2000 and January 31, 2001. (R2. 4-176.) During the December 7, 2000 hearing, Miller, through appellate counsel, called his trial counsel, Mickey Johnson, at the hearing and questioned him extensively regarding his preparation for and performance during his

trial as well as his trial strategies. (R2. 4-110) On January 31, 2000, Miller presented the testimony of Dr. Bob Wendorf, a clinical psychologist, to critique Dr. Scott's testimony during the penalty phase of Miller's trial. (R2. 111-156) Miller also called Aaron McCall from the Alabama Prison Program to discuss the role and availability of mitigation expert assistance. (R2. 157-175) After the hearing, Miller filed a Brief in Support of Motion for New Trial and provided arguments in support of his claim of ineffective assistance of counsel. (C. 114-125)

On February 21, 2001, the trial court denied Miller's motion for new trial. (C. 132) Miller subsequently filed a brief on appeal in the Alabama Court of Criminal Appeals, in which he raised a number of ineffective assistance of trial counsel claims. On remand from the Court of Criminal Appeals, the trial court entered a written order providing specific findings of fact regarding the claims raised in Miller's motion for new trial. In that order, the trial court addressed Miller's ineffective assistance of trial counsel claims at length: 1) that trial counsel admitted Miller's guilt during the guilt phase opening statements, 2) that trial counsel failed to present an

insanity defense during the guilt phase, 3) that trial counsel failed to move for a change of venue, 4) that trial counsel failed to present a defense during the guilt phase of trial, 5) that trial counsel undermined the mitigation case during the penalty phase opening statement, 6) that trial counsel failed to object to victim impact testimony during the penalty phase, 7) that trial counsel failed to adequately investigate and present a penalty phase defense, and 8) that trial counsel failed to challenge the constitutionality of the heinous, atrocious, and cruel aggravating circumstance.

In reviewing those claims, the trial court found all of Miller's claims of ineffective assistance of trial counsel to be without merit. (See Appendix B) Thus, the trial court thoroughly reviewed and considered the evidence that was presented at the hearing on Miller's motion for new trial. Based both on the trial court's review of that evidence and personal knowledge of what transpired during his trial, the trial court rejected Miller's ineffective assistance of trial counsel claims and denied relief.

On return from remand, the Court of Criminal Appeals affirmed Miller's capital murder conviction and death

sentence. Miller v. State, 913 So. 2d 1148 (Ala. Crim. App. 2004). In its decision, that Court thoroughly reviewed and rejected his ineffective assistance of trial counsel claims. Miller, 913 So. 2d at 1161-63.

As shown above, Miller, through appellate counsel, moved this Court to continue the hearing on his motion for new trial until the trial transcript was completed to allow for a full review of his ineffective assistance of trial counsel claims. (C. 108-09) Given that the trial court appointed appellate counsel to represent Miller on or about August 1, 2000 and the hearings on Miller's motion for new trial were not held until December 7, 2000 and January 31, 2001, nearly *six months* passed between the trial court's appointment of appellate counsel and the completion of the hearing on Miller's motion for new trial. As appellate counsel Hill testified during the Rule 32 hearing, this lengthy period of time was utilized to study the transcript of Miller's trial, review trial counsel's files, conduct legal research, discuss strategy with appellate counsel Lowe, interview Miller, talk with Miller's mother and otherwise prepare to litigate Miller's ineffective assistance of trial counsel claims. (Rule 32 R2. 13, 60-62)

Thus, Miller's newly appointed appellate counsel had a copy of his trial transcript, engaged in an in depth investigation of his ineffective assistance of trial counsel claims, and fully litigated those claims at the hearing on his motion for new trial. Miller also raised a number of ineffective assistance of trial counsel claims on appeal. Accordingly, Miller's claims of ineffective assistance of trial counsel are procedurally barred under Rule 32.2(a)(2) and (4) because they were raised at trial and on appeal. To the extent that Miller has expanded his allegations of ineffective assistance of trial counsel beyond those presented to the trial court, the new allegations are procedurally barred from this Court's review because they could have been but were not raised in Miller's motion for a new trial and on appeal. Ala. R. Crim. P. 32.2(a)(3) and (5); see Russell v. State, 886 So. 2d 123, 126 (Ala. Crim. App. 2003).

In the current post-conviction proceeding, after conducting a hearing on the State's motion to dismiss Miller's amended petition, this Court dismissed Miller's ineffective assistance of trial counsel claims as procedurally barred because such claims were raised during

trial and on appeal. (See Appendix A, M.H. at 25-26) In accordance with this Court's order, Miller's ineffective assistance of trial counsel claims are procedurally barred from review and therefore, the following claims are summarily dismissed under Rule 32.7(d) of the Alabama Rules of Criminal Procedure (these claims include all claims listed as Claim I(A) in Miller's amended petition):

> Claim I(A)(1)(a) - The Claim That Miller's Trial Counsel Failed to Adequately Interview Him and His Family to Learn Critical Background Facts Concerning His Upbringing. Rule 32.2(a)(2) and Rule 32.2(a)(5).
>
> Claim I(A)(1)(b) - The Claim That Miller's Trial Counsel Failed to Obtain His Medical Records. Rule 32.2(a)(2) and Rule 32.2(a)(5).
>
> Claim I(A)(1)(c) - The Claim That Miller's Trial Counsel Failed to Investigate Evidence of Miller's Good Character and Family and Personal Relationships. Rule 32.2(a)(2) and Rule 32.2(a)(5).
>
> Claim I(A)(1)(d) - The Claim That Miller's Trial Counsel Failed to Investigate Mental Health Evidence to Support Defense Theories In The Guilt and Penalty Phases. Rule 32.2(a)(2) and Rule 32.2(a)(5).
>
> Claim I(A)(2)(a) - The Claim That Miller's Trial Counsel Failed to Seek a Continuance When Mr. Bass Withdrew A Few Weeks Before Trial. Rule 32.2(a)(2) and Rule 32.2(a)(5).
>
> Claim I(A)(2)(b) - The Claim That Miller's Trial Counsel Erroneously Withdrew the Insanity Defense

Weeks Before Trial. Rule 32.2(a)(2) and Rule 32.2(a)(4).

Claim I(A)(2)(c) - The Claim That Miller's Trial Counsel Failed to Move for a Change of Venue Despite Extensive, Prejudicial Pre-Trial Publicity. Rule 32.2(a)(2) and Rule 32.2(a)(4).

Claim I(A)(3)(a) - The Claim That Miller's Trial Counsel Conducted Ineffective Juror Voir Dire. Rule 32.2(a)(2) and Rule 32.2(a)(5).

Claim I(A)(3)(b) - The Claim That Miller's Trial Counsel's Opening Statement in the Guilt Phase Was Deficient and Prejudicial to Miller. Rule 32.2(a)(2) and Rule 32.2(a)(4).

Claim I(A)(3)(c) - The Claim That Miller's Trial Counsel Violated Miller's Constitutional Rights by Failing to Offer Any Defense During the Guilt Phase. Rule 32.2(a)(2) and Rule 32.2(a)(4).

Claim I(A)(3)(d) - The Claim That Miller's Trial Counsel Failed to Object to the Admission of Irrelevant and Prejudicial Testimony and Photographs by the State. Rule 32.2(a)(2) and Rule 32.2(a)(5).

Claim I(A)(3)(e) - The Claim That Miller's Trial Counsel Failed to Effectively Cross-Examine Crucial Prosecution Witnesses. Rule 32.2(a)(2) and Rule 32.2(a)(4).

Claim I(A)(3)(f) - The Claim That Miller's Trial Counsel's Closing Argument in the Guilt Phase Was Deficient and Prejudicial to Miller. Rule 32.2(a)(2) and Rule 32.2(a)(5).

Claim I(A)(3)(g) - The Claim That Miller's Trial Counsel Failed to Object to Misleading Portions of the State's Closing Argument. Rule 32.2(a)(2) and Rule 32.2(a)(5).

Claim I(A)(3)(h) - The Claim That Miller's Trial Counsel Failed to Request Jury Instructions Necessary to Protect Miller's Rights. Rule 32.2(a)(2) and Rule 32.2(a)(5).

Claim I(A)(4)(a) - The Claim That Miller's Trial Counsel's Penalty Phase Opening Statement Was Deficient and Prejudicial. Rule 32.2(a)(2) and Rule 32.2(a)(4).

Claim I(A)(4)(b) - The Claim That Miller's Trial Counsel Failed to Adequately Present Readily Available Mitigating Evidence to the Jury. Rule 32.2(a)(2) and Rule 32.2(a)(4).

Claim I(A)(4)(c) - The Claim That Miller's Trial Counsel Failed to Object to Irrelevant and Prejudicial Victim Impact Testimony Offered by the State. Rule 32.2(a)(2) and Rule 32.2(a)(4).

Claim I(A)(4)(d) - The Claim That Miller's Trial Counsel's Penalty Phase Closing Argument Was Deficient and Prejudicial. Rule 32.2(a)(2) and Rule 32.2(a)(5).

Claim I(A)(4)(e) - The Claim That Miller's Trial Counsel Failed to Request a Special Verdict Form That Was Necessary to Protect Miller's Rights. Rule 32.2(a)(2) and Rule 32.2(a)(5).

Claim I(A)(4)(f) - The Claim That Miller's Trial Counsel Failed to Object to the Court's Description of the Verdict as a Mere "Recommendation". Rule 32.2(a)(2) and Rule 32.2(a)(5).

Claim I(A)(5) - The Claim That Miller's Trial Counsel Failed to Investigate Mitigating Circumstances, Prepare Adequately, or Offer Available Mitigation Evidence at the Sentencing Hearing. Rule 32.2(a)(3) and Rule 32.2(a)(5).

II. Miller's Claim That His Death Sentence Violates The Sixth, Eighth, And Fourteenth Amendments Of The United States Constitution.

In claim II, paragraphs 289-98 of his amended petition, Miller claims that his death sentence violates Ring v. Arizona, 536 U.S. 584 (2002). However, this Court previously dismissed this claim because it was raised during the course of Miller's appeal. (See Appendix A) This claim was specifically addressed and rejected by the Court of Criminal Appeals on direct appeal. See Miller v. State, 913 So. 2d 1148, 1167 (Ala. Crim. App. 2004). Accordingly, this claim is procedurally barred under Ala. R. Crim. P. 32.2(a)(4) because it was raised and addressed on appeal and therefore properly summarily dismissed. Ala. R. Crim. P. 32.7(d).

III. Miller's Claim That Alabama's Method of Execution By Lethal Injection Constitutes Cruel And Unusual Punishment.

In claim III, paragraphs 299-302 of his amended petition, Miller claims that lethal injection is unconstitutional. However, this Court previously dismissed this claim because it could have been raised during the course of Miller's appeal. (See Appendix A) Accordingly, this claim is procedurally barred under Ala. R. Crim. P.

32.2(a)(5) because it could have been raised and addressed on appeal and therefore properly summarily dismissed. Ala. R. Crim. P. 32.7(d).

Furthermore, this claim is completely without merit. The Alabama Supreme Court has recently held that Alabama's use of lethal injection as a method of execution did not constitute cruel and unusual punishment. Ex parte Belisle, No. 1061071, 2008 WL 4447593 (Ala. October 3, 2008).

IV. Miller's Claim That The State Withheld Favorable Evidence In Violation Of Brady v. Maryland.

This claim fails to meet the pleading and specificity requirements of Ala. R. Crim. P. 32.6(b). In its previous order of July 31, 2007, this Court ordered that this claim was summarily dismissed unless Miller amended the claim within 60 days. Miller failed to do so. Therefore, this claim is summarily dismissed. Ala. R. Crim. P. 32.7(d).

V. Miller's Claim That Juror Misconduct Occurred During Trial.

This claim fails to meet the pleading and specificity requirements of Ala. R. Crim. P. 32.6(b). In its previous order of July 31, 2007, this Court ordered that this claim was summarily dismissed unless Miller amended the claim

within 60 days. Miller failed to do so. Therefore, this claim is summarily dismissed. Ala. R. Crim. P. 32.7(d).

THE REMAINING CLAIMS FOR RELIEF IN MILLER'S AMENDED PETITION

I(B). Miller's Claim That Appellate Counsel Was Ineffective In Investigating and Presenting The Case For Trial Counsel's Ineffectiveness Should Be Denied.

The only remaining claim that is not subject to summary dismissal is Miller's allegation in claim I(B) of his amended petition that his appellate counsel provided ineffective assistance. In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court set forth the standard by which ineffective assistance of counsel claims are to be judged. To prevail on an ineffective assistance of counsel claim, a petitioner must show that: (1) counsel's performance was deficient because it fell below an objective standard of reasonableness; and, (2) that the deficient performance prejudiced the petitioner. Id. at 687. In promulgating that standard, the Court held:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to

> deprive the defendant of a fair trial, a trial whose result is reliable.

Id. This two-part test also applies to claims of ineffective assistance of appellate counsel. Johnson v. Alabama, 256 F.3d 1156, 1187 (11th Cir. 2001).

The standard for judging counsel's performance is "reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688. There is a strong presumption that counsel's conduct falls within the "wide range of reasonable professional assistance." Id. at 689. Otherwise, "[a]n attorney looking at a trial transcript can always find places where objections could have been made. Hindsight is not always 20/20, but hindsight is always ineffective in evaluating performance of trial counsel." Tarver v. State, 629 So. 2d 14, 18-19 (Ala. Crim. App. 1993). Accordingly, because counsel's conduct is presumed to have been reasonable, the analysis under Strickland "has nothing to do with what the best lawyers would have done ... [or] what most good lawyers would have done." Grayson v. Thompson, 257 F.3d 1194, 1216 (11th Cir. 2001). Instead, the question is whether "some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." Id.

For that reason, "to show that counsel's performance was unreasonable, the petitioner must establish that *no competent counsel would have taken the action that his counsel did take.*" Id. (emphasis in original). Thus, counsel's performance will not be found deficient if a reasonable lawyer could have decided, under the same circumstances, not to investigate or present particular evidence. See Crawford v. Head, 311 F.3d 1288, 1312 (11th Cir. 2002)("This court agrees that testimony from a mental health expert ... would have been admissible and might be considered to be mitigating. However, trial counsel chose to pursue a strategy of focusing the jury's attention on the impact of a death sentence on petitioner's family. This court will not second guess trial counsel's deliberate choice."); Housel v. Head, 238 F.3d 1289, 1295 (11th Cir. 2001) ("[A]bandoning one defense in favor of another that counsel reasonably perceives to be more meritorious is not deficient performance, even if it means that the jury does not hear certain kinds of mitigation evidence.").

Under the prejudice prong of Strickland, 466 U.S. at 693, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the

proceeding." Instead, "[t]he question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Id. at 695. Thus, in determining whether, "without the errors, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different," a reviewing court must consider the aggravating circumstances that were proved beyond a reasonable doubt at trial. See also Bolender v. Singletary, 16 F.3d 1547, 1556-1557 (11th Cir. 1994).

The Supreme Court's decision in Strickland mandates that Miller's claims be reviewed with a presumption that his counsel was effective. For that reason, where the record is unclear or silent – either because an issue was not addressed or because his counsel could not recall – this Court should presume that his counsel acted in a manner consistent with the counsel that is guaranteed by the Sixth Amendment. Hooks v. State, CR-04-2220, 2008 WL 3989502 at *19 (Ala. Crim. App. August 29, 2008) (referencing Grayson v. Thompson, 257 F.3d 1194, 1218 (11th

Cir. 2001); see also Chandler v. United States, 218 F.3d 1305, 1315 n.15 (11th Cir. 2000).

In paragraphs 280-288 of his amended petition, Miller alleges that his appellate counsel were ineffective during their investigation and preparation for his motion for a new trial and on direct appeal. Miller claims that his appellate counsel were ineffective in the following areas: 1) that his appellate counsel did nothing to independently investigate his case (Paragraphs 282-83), 2) that appellate counsel were ineffective in arguing that trial counsel was ineffective for withdrawing the insanity defense and failing to present evidence in the guilt phase to negate intent (Paragraph 284), 3) that appellate counsel failed to obtain medical records for Miller and his family and failed to have Miller independently examined by a mental health expert (Paragraphs 285-86), 4) and that appellate counsel failed to raise additional claims of error during the motion for new trial such as trial counsel's allegedly ineffective performance during voir dire (Paragraph 287). (Pet. at 84-88)

Miller's claim is denied because he has failed to prove that his appellate counsels' performance during the motion

for new trial hearing and on direct appeal was deficient and unreasonable. Miller also failed to demonstrate that appellate counsel's performance was not the product of a strategic decision.

Miller's appellate counsel went to great lengths to fully investigate the issue of the ineffectiveness of trial counsel during the hearing on Miller's motion for new trial. After being appointed as appellate counsel for Miller and filing a motion for new trial, appellate counsel obtained several continuances for the hearing on the motion for new trial in order for the trial transcript to be prepared. (C. 132) Appellate counsel utilized this time to investigate, research and prepare to present several claims of ineffective assistance of trial counsel.

Appellate counsel Billy Hill testified at the Rule 32 evidentiary hearing that during this time before the trial transcript was completed, he met with Miller in the Shelby County jail and obtained general family background information. (Rule 32 R2. 13, 15) Hill also testified that he reviewed reports of trial counsel's conduct in the local newspapers and both Hill and appellate counsel Haran Lowe testified that they interviewed and discussed the trial

with Barbara Miller, Alan's mother. (Rule 32 R2. 22, 30, 84) During the interview with Ms. Miller, appellate counsel was alerted to the possible history of mental illness in Miller's family. (Rule 32 R2. 30) As a result, appellate counsel attempted to obtain access to the mental health records of Miller's grandfather and father from Bryce Hospital but was unsuccessful. (Rule 32 R2. 34, 86)

Hill and Lowe received the trial transcript on November 2, 2000, studied the transcript and identified potential errors and defects in trial counsel's performance. (Rule 32 R2. 23, 84) After examining the transcript, appellate counsel conducted legal research, reviewed Dr. Scott's report of his evaluation of Miller, acquired and reviewed trial counsel Johnson's entire case file, and gathered newspaper articles about Miller's trial that were written in the Shelby County area. (Rule 32 R2. 60) Finally, Hill testified that they interviewed Johnson in preparation for the hearing on the motion for new trial. (Rule 32 R2. 36)

Based on this investigation and after spending a great deal of time thinking about Miller's case, Hill testified that he identified several major concerns regarding trial counsel's performance. (Rule 32 R2. 41-43, 58)

Specifically, Hill stated that he was concerned about trial counsel Johnson's failure to present a mental capacity argument during the guilt phase, that Johnson dropped the insanity defense, that Johnson had a "defeatist attitude" and that there was significant pre-trial publicity. (Rule 32 R2. 41-42) Accordingly, Hill testified that he focused on preparing to present those claims that would provide the strongest argument for relief during the hearing on the motion for new trial. (Rule 32 R2. 63)

To address the specific concerns regarding trial counsel's performance, Hill called Johnson to testify during the December 7, 2000 hearing. (R2. 4-110) During the evidentiary hearing, Hill stated his strategic purpose for calling Johnson: 1) to emphasize statements made by Johnson before trial that were prejudicial, 2) to show that essentially no mitigation testimony was presented, and 3) that trial counsel did not present mental health evidence during the case in chief. (Rule 32 R2. 43)

A review of appellate counsel's questioning of Johnson during the December 7, 2000 motion for new trial hearing demonstrates that Hill thoroughly examined Johnson on those issues. The focal point of Hill's examination of Johnson

centered on Johnson's strategy during the guilt phase of Miller's trial. (R2. 14-17, 29-37) Hill specifically asked Johnson whether he actually had a theory of defense to the charge of capital murder. (R2. 14) After Johnson stated that the evidence of guilt was too overwhelming, Hill then probed Johnson on why he did not have Dr. Scott "make an examination as to whether or not his delusional diagnosis could have impacted his ability to form a specific intent" so that a manslaughter defense could have been argued during the guilt phase. (R2. 16) Hill then elicited testimony from Johnson that he did not use the readily available evidence in Dr. Scott's report that Miller was in a delusional state, made no attempts to shoot witnesses, made no attempt to cover up the crime, and that Miller did not understand what was going on to argue during the guilt phase that Miller could not form specific intent necessary to sustain a conviction for capital murder. (R2. 28-29, 36-37) Finally, in response to Hill's questioning, Johnson agreed that he had "conceded the guilt phase of this case." (R2. 35)

Next, Hill introduced reports from a number of newspapers, including the Birmingham News, which preceded

Miller's trial. (R2. 50) Hill then questioned Johnson on why he was not concerned that comments Johnson made in the Birmingham News regarding the withdrawal of the insanity plea could have been prejudicial. (R2. 52) Hill then asked Johnson whether he was aware of the extensive coverage of Miller's case and why Johnson did not move for a change of venue. (R2. 54)

Finally, Hill questioned Johnson regarding his trial strategy during the penalty phase, Johnson's investigation of mitigating evidence and the presentation of mitigation evidence during the penalty phase. (R2. 17-25, 65-70) Johnson testified that his strategy during the penalty phase involved presenting the testimony of Dr. Scott to demonstrate that Miller suffered from a diminished capacity. (R2. 17-18) Hill then repeatedly questioned Johnson on the reasons he did not present additional mitigating evidence such as testimony concerning Miller's bad relationship with his father, the testimony of Miller's family members, specifically his mother, Barbara Miller, concerning Miller's background and evidence of Miller's grandfather's psychiatric issues. (R2. 20-24, 65-68)

In a further attempt to prove that trial counsel was ineffective in the presentation of mental health evidence, appellate counsel sought and were granted funds to hire Dr. Bob Wendorf, a clinical psychologist who testified at the January 31, 2001 hearing on Miller's motion for new trial. (C. 132) Appellate counsel Hill stated that he made a strategic decision to call Dr. Wendorf in order to show that based on the information available in Dr. Scott's report, there were additional psychological diagnoses that could have pertained to Miller that were not pursued by trial counsel. (Rule 32 R2. 44, 70). Specifically, based on the information contained in Dr. Scott's report that Miller described himself as being in a dream state during the shootings, Dr. Wendorf testified that such actions were consistent with symptoms of a dissociative disorder such as post-traumatic stress disorder or multiple personality disorder. (R2. 144-46) Hill then elicited from Dr. Wendorf that the effects of such disorders could have had an impact on the ability to form intent. (R2. 147)

Finally, in an effort to prove that trial counsel had not presented adequate mitigation evidence during the penalty phase, appellate counsel called Aaron McCall, an

employee of the Alabama Prison Project to testify during the January 31, 2001 hearing. (R2. 157-175) Hill testified during the evidentiary hearing that the strategic purpose for calling McCall was to prove that a qualified mitigation expert witness was available to conduct a full mitigation investigation of Miller's life. (Rule 32 R2. 49) In fact, in an effort to demonstrate that mitigation experts were available at the time of Miller's trial, appellate counsel Lowe introduced a letter sent by McCall to trial counsel Johnson in August of 1999 in which the Alabama Prison Project offered services and assistance in providing mitigating evidence for the trial. (R2. 158-60)

The evidence presented during the Rule 32 evidentiary hearing demonstrates that both appellate counsel vigorously investigated Miller's case in preparation for presenting a case of ineffective assistance of counsel and adequately presented such claims during the December 7, 2000 and January 31, 2000 hearings on Miller's motion for new trial. Miller has not met the burden of demonstrating that his appellate counsel's performance was deficient under the first Strickland prong. Miller has failed to establish that appellate counsel's performance was so unreasonable

that no competent counsel would have investigated and presented claims of ineffective assistance of trial counsel during the motion for new trial hearing and on direct appeal in the manner in which appellate counsel Hill and Lowe presented Miller's case. See Grayson v. Thompson, 257 F.3d 1194, 1216 (11th Cir. 2001).

Contrary to Miller's claims in paragraph 282 of his amended petition that appellate counsel did not interview family members, Hill and Lowe specifically stated that they interviewed Barbara Miller in preparation for the hearing on the motion for new trial. (Rule 32 R2 30, 84) Contrary to Miller's claims that appellate counsel did not obtain any documents pertaining to Miller's life and background, both of his appellate counsel testified that they unsuccessfully attempted to obtain Miller's family psychiatric records. (Rule 32 R2. 34, 86) Simply because appellate counsel were unsuccessful in obtaining these records does not demonstrate deficient performance. Furthermore, even if the mental health records of Miller's family members were obtained, Miller has failed to establish that a competent attorney would have introduced such records. Both Hill and Lowe testified that in their

extensive experience defending capital murder cases, neither had introduced the psychiatric or medical records of a defendant's extended family. (Rule 32 R2. 69, 103)

Furthermore, although Hill testified that he did not interview other family members or accumulate other documents, Miller failed to present any evidence during the evidentiary hearing as to why appellate counsel did not conduct further interviews or obtain more of Miller's records. Miller failed to question appellate counsel on the strategic reasons for how appellate counsel conducted their investigation in this regard. There is a strong presumption that counsel's performance was within the "wide range of reasonable professional assistance." Grayson v. Thompson, 257 F.3d 1194, 1216 (11th Cir. 2001). "An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption [because] where the record is incomplete or unclear about [counsel's] actions, [the court] will presume that he did what he should have done, and that he exercised reasonable professional judgment." Chandler v. United States, 218 F.3d 1305, 1315, n.15 (11th Cir. 2000). Because the record is silent as to why appellate counsel did not interview more of Miller's

family members and obtain additional educational, mental, or employment records, this Court must presume that appellate counsel acted reasonably in representing Miller. For that reason, Miller's claims should be denied.

Although Miller claims that appellate counsel ineffectively argued that trial counsel failed to present mental health evidence during the guilt phase that would have negated the intent for capital murder, Hill specifically questioned Johnson on his failure to present evidence of Miller's mental condition during the guilt phase. (Rule 32 R. 64) Hill testified that he and Lowe made a strategic decision to challenge trial counsel's performance in this regard during the guilt phase. (Rule 32 R2. 66) Hill's strategy involved demonstrating that there was evidence within Dr. Scott's report that suggested Miller did not appreciate the nature and quality of his acts, that this evidence would be significant in mounting a defense to capital murder charges, and that this evidence was not presented during the guilt phase. (Rule 32 R2. 64-65) Appellate counsel's strategic choices after conducting extensive legal research and review of the trial transcript and Dr. Scott's report should not be found to be deficient.

See Boyd v. State, 746 So. 2d 364, 375 (Ala. Crim. App. 1999)("Strategic choices made after a thorough investigation of relevant law and facts are virtually unchallengeable.") The ultimate result that appellate counsel's strategy to attempt to demonstrate ineffective assistance of trial counsel was unsuccessful does not prove deficient performance of appellate counsel. See Davis v. State, 2008 WL 902884 at *8 (Ala. Crim. App. April 4, 2008)("The fact that a particular defense was unsuccessful does not prove ineffective assistance of counsel")(quoting Chandler v. United States, 218 F.3d 1305, 1314 (11th Cir. 2000)).

Finally, Miller has not proven that appellate counsel were deficient under Strickland for failing to present additional claims of ineffective assistance of trial counsel during the motion for new trial hearing that have been raised by current post-conviction counsel. (Pet. at 87) To constitute effective assistance, "an attorney is not required to raise every conceivable constitutional claim available at trial and on appeal." Boyd, 746 So. 2d at 376. Moreover, Hill testified during the evidentiary hearing that he had strategic reasons for presenting specific

issues of ineffective assistance of trial counsel; Hill testified that he focused on presenting the strongest claims during the motion for new trial hearing. (Rule 32 R2. 63) Hill testified that he made strategic decisions to focus on trial counsel's failure to present evidence during the guilt phase, trial counsel's failure to move for change of venue, and trial counsel's failure to effectively challenge the aggravating circumstance presented during the penalty phase. (Rule 32 R2. 66-67) Miller has failed to establish that no competent counsel would have pursued such strategies.

For these reasons mentioned above, Miller has failed to meet his burden of proof of establishing that his appellate counsel's performance was deficient under Strickland; therefore Miller's ineffective assistance of appellate claims are without merit. Accordingly, these claims are denied.

Additionally, this claim is denied because Miller has failed to sustain his burden of proof of establishing that he was prejudiced by his appellate counsels' performance. In paragraphs 280-88 of his amended petition, Miller alleges both that his appellate counsel ineffectively

presented claims of ineffective assistance of trial counsel during the hearing on his motion for new trial and that his appellate counsel were ineffective for failing to raise additional claims of ineffective assistance of trial counsel as contained in Miller's current amended petition.

However, Miller has failed to establish that he was prejudiced by his appellate counsel's alleged failure to effectively present the issue of the ineffectiveness of trial counsel because his trial counsel's performance was not ineffective under Strickland. In order to prove that appellate counsel was ineffective for failing to present the issue of trial counsel's alleged ineffectiveness, Miller bears the burden of proving that his trial counsel were indeed ineffective under Strickland. Although Miller's ineffective assistance of trial counsel's claims are procedurally barred, he failed to establish during the evidentiary hearing that he is entitled to relief on any of his claims of ineffective assistance of trial counsel. Therefore, because he has failed to establish that his trial counsel were ineffective, Miller has also failed to establish a reasonable probability that had his appellate counsel presented claims of ineffective assistance of trial

counsel more effectively the outcome of the motion for new trial would have been different. See Payne v. State, 791 So. 2d 383, 401 (Ala. Crim. App. 1999)(holding the because petitioner's claim of ineffective assistance of trial counsel was rejected, appellate counsel was therefore not ineffective). Because Miller has incorporated all of his ineffective assistance of trial counsel claims (paragraphs 25-279) into his claim of ineffective assistance of appellate counsel, in order to demonstrate Miller's failure to meet his burden of proof regarding the prejudice prong of Strickland for claim I(B) of his amended petition, this Court will address Miller's ineffective assistance of trial counsel claims below:

A. Miller's Claim That His Trial Counsel Failed To Conduct an Adequate Investigation.

In paragraphs 25-132 of his amended petition, Miller claims that his trial counsel failed to conduct an adequate investigation and as a result, failed to discover relevant evidence that could have led to him being found not guilty of capital murder by the jury or that could have led to a sentence of life imprisonment. (Pet. at 6) Miller claims that trial counsels' investigation was inadequate in the following areas: 1) that trial counsel failed to interview

Miller and his family to learn critical background facts, 2) that trial counsel failed to obtain Miller's medical records, 3) that trial counsel failed to investigate evidence of Miller's good character and personal relationships, and 4) that trial counsel failed to investigate mental health evidence. This Court denies each of Miller's claims because he has either failed to establish proof of such claims, abandoned his claims, or the claims are refuted by the record.

1. Miller's Claim That Trial Counsel Failed To Adequately Interview Miller and His Family To Learn Critical Background Facts Concerning Miller's Upbringing.

In paragraphs 31-65 of his amended petition, Miller alleges that his trial counsel failed to adequately investigate facts pertaining to his background and develop a mitigation case to present to the jury. (Pet. at 8) Miller claims that his trial counsel failed to utilize his family members as a source of information concerning Miller's unstable childhood and the physical and psychological abuse he received.

This claim is denied by this Court because it is directly refuted by the record and is therefore without merit. See Gaddy v. State, 952 So. 2d 1149, 1161 (Ala.

Crim. App. 2006); Duncan v. State, 925 So. 2d 245, 266 (Ala. Crim. App. 2005). Trial counsel Johnson testified that he met with Miller personally "at least half a dozen times." (R2. 10) During the evidentiary hearing, Johnson stated that he and co-counsel Bass interviewed Miller on numerous occasions from the beginning of their representation in August of 1999 up until the time of trial. (Rule 32 R. 32, 41, 45, 46) Johnson stated that the purpose of these meetings involved conducting "continued preparation for trial." (Rule 32 R. 46-47)

Johnson also interviewed Miller's family members such as his father, mother, and his sisters with the specific focus of uncovering general background information and facts concerning his relationship with his father. (R2. 21-22) Johnson met with the family on the day of the shootings on August 5, 1999 and spoke with his mother Barbara and his brother Richard in order to get family background information. (Rule 32 R. 38-39) Bass had a thirty minute phone conversation with Barbara Miller on August 6, an hour long conversation with Lisa Miller, Miller's sister on August 29, and had discussions again with Barbara Miller on October 24 and November 8. (Rule 32 R. 40, 42, 44, 45)

Johnson testified that these meetings with Miller's family were part of an "ongoing effort" to get helpful information and that Bass would have shared this information with him. (Rule 32 R. 41, 43-44)

Johnson himself met with Barbara Miller for a 90 minute conference on March 1, 2000 and also talked with Brian Miller, his cousin, and Lisa Carden, his sister. (Rule 32 R. 46, 163, 165) Based on these interviews, Johnson testified that he learned information about Miller's background and upbringing. (Rule 32 R. 165-66) Additionally, trial counsel discovered from the interviews evidence of a family history of mental illness. (Rule 32 R. 80) Johnson also recalled receiving information about Miller's upbringing and background as well as positive information about Miller from his brother, Richard Miller. (Rule 32 R. 159) Given that the records of both the motion for new trial hearing and the Rule 32 evidentiary hearing indicate that trial counsel met with Miller and his family numerous times for the purpose of developing information concerning his background and upbringing and therefore directly refutes Miller's allegation, this claim is denied. See Gaddy, 952 So. 2d at 1161.

This Court also denies Miller's claim because Miller has failed to meet his burden of proof of demonstrating that his trial counsels' performance was deficient under Strickland, 466 U.S. at 687. Ala. R. Crim. P. 32.7(d). As noted above, evidence was presented that trial counsel Johnson and Bass repeatedly interviewed Miller and his mother and spoke with his father, brother and sisters for the purpose of discovering information relating to Miller's upbringing and family background. (R2. 21-22, Rule 32 R. 38-46) Miller failed to present any evidence during the evidentiary hearing that trial counsel failed to ask a specific question regarding his unstable childhood or his childhood history of abuse. Therefore, because the record is silent, trial counsels' performance in regards to his investigation and interviews of Miller and his family is presumed to be reasonable. See Williams v. Head, 185 F.3d 1223, 1228 (11th Cir. 1999) ("[W]here the record is incomplete or unclear about [counsel's] actions, we will presume that he did what he should have done and that he exercised reasonable professional judgment."); Chandler v. United States, 218 F.3d 1305, 1315 n.15 (11th Cir. 2000) (En Banc).

Trial counsel was not deficient in the scope of family interviews conducted during his background information, despite Miller's laundry list of family members he alleges should have been interviewed: his father, Ivan Miller, his sisters, Lisa Carden and Cheryl Ellison, his brother, Richard Miller, his half-brother, Jeff Carr, his niece, Alicia Sanford, his nephew, Jake Connell, his cousin, Brian Miller, and his uncle, Perry Miller. (Pet. at 9-10) Contrary to Miller's claims, trial counsel met with and interviewed, Ivan Miller, Richard Miller, Lisa Carden, and Brian Miller. (R2. 21-22, Rule 32 R. 159, 163, 165) Neither Jeff Carr nor Perry Miller testified during the evidentiary hearing, therefore there is no record whatsoever of whether these family members could have provided any relevant background information.

Miller has failed to prove that trial counsels' investigation of his family members was not reasonable, nor has he demonstrated that all reasonably competent counsel would have also interviewed the additional family members Miller claims should have been interviewed. Regardless, trial counsel cannot be found deficient for failing to interview the remaining family members concerning

information on Miller's life: Cheryl Ellison, Alicia Sanford, and Jake Connell. First, information from Cheryl Ellison was ultimately obtained through her interview with Miller's psychiatric expert Dr. Scott. (Rule 32 R. 315) Additionally, the evidence presented during the evidentiary hearing demonstrates that Ellison failed to provide any meaningful information. Although Cheryl Ellison stated that she knew of Miller since he was born, she also testified that she did not grow up with the immediate Miller family and stated that she spent "very little" time with the Miller family throughout her childhood. (Rule 32 R. 501) Ellison's testimony during the evidentiary hearing provided virtually no additional, relevant information concerning Miller's background other than general testimony that Ivan Miller was a bad person and irrelevant testimony concerning Miller's brother, Ivan Ray Miller's death and funeral. (Rule 32 R. 500-529)

Furthermore, trial counsel had no reason to interview Miller's niece, Alicia Sanford and his nephew, Jake Connell. Alicia Sanford testified that she was 14 years old at the time of trial and did not attend Miller's trial, nor did she attend any family meetings with trial counsel.

(Rule 32 R. 498-99) Not only could trial counsel not have been aware of whether Alicia Sanford was available to testify, but it is unlikely that a witness 14 years old at the time of trial could have provided any background information whatsoever pertaining to Miller who was over twice her age. Similarly, trial counsel reasonably had no ability to be aware of Jake Connell's availability as a witness, nor could Connell provide any useful background information. Connell was 18 years old at the time of Miller's trial, did not spend much time growing up with Miller, and did not attend Miller's trial. (Rule 32 R. 584-85)

Finally, the investigation into Miller's childhood background and history of abuse through the interviews of family members was adequately performed by Dr. Charles Scott, the psychologist who testified during the penalty phase of Miller's trial. See Hall v. State, 979 So. 2d 125, 163 (Ala. Crim. App. 2007)("It is neither unprofessional nor unreasonable for a lawyer to use surrogates to investigate and interview potential witnesses rather than doing so personally")(referencing Harris v. Dugger, 874 F.2d 756, 762 & n. 8 (11th Cir.1989)). Although Dr. Scott

was not originally engaged by trial counsel for the express purpose of conducting a mitigation investigation, Johnson felt that Dr. Scott did "a pretty thorough job of getting family history that he felt was relevant, employment history, all of those that you want to present some information about to a jury. He was able to present those things with the jury." (Rule 32 R. 188, 222) During the penalty phase of Miller's trial, Dr. Scott confirmed the importance of his role in learning as much as he could about Miller's social background, personal history, as well as the facts of Miller's case. (R. 1348)

As part of his investigation, Dr. Scott met with Miller over a period of three days and conducted extensive interviews and examinations. (Rule 32 R. 314) To confirm background information, Dr. Scott also interviewed Barbara Miller, his brother, Richard Miller, and his sister Cheryl Ellison. (Rule 32 R. 315) After Dr. Scott's investigation was completed, Johnson then discussed with Dr. Scott the areas in which Dr. Scott could provide helpful mitigation testimony during the penalty phase of Miller's trial. (Rule 32 R. 190, 253-54) Therefore, because trial counsel, both through his own investigation and through that of Dr.

Scott, thoroughly inquired into the background and history of abuse in Miller's childhood, Miller has failed to meet his burden of proof of demonstrating that his trial counsels' investigation was deficient and this claim is denied.

This claim is also denied by this Court because Miller has failed to meet his burden of proof of establishing that he was prejudiced by his trial counsels' performance under Strickland, 466 U.S. at 687. Ala. R. Crim. P. 32.7(d). Even if Miller could have demonstrated that his trial counsels' investigation of his background was deficient, he cannot prove that he was prejudiced because extensive testimony was nonetheless presented during the penalty phase of his trial regarding his unstable childhood and the physical and emotional abuse Miller suffered.

Dr. Scott's initial testimony during the penalty phase focused squarely on Miller's family background. (R. 1348-1353) Dr. Scott testified that Miller had an "unusual" childhood and was forced to uproot from Illinois, Alabama and Texas at least seven to ten times. (R. 1349) Dr. Scott stated that these frequent moves were the consequence in part of Miller's father, Ivan's, inability to keep a steady

job. (R. 1349) As a result, Miller's family was "on the edge of poverty" and Miller personally had to quit school as early as the eleventh grade to get a job to support the family. (R. 1349-50)

Dr. Scott also provided testimony on Ivan's abusive behavior towards Miller. Dr. Scott documented Ivan's verbal abuse, testifying that Ivan called Miller a "son of a bitch." (R. 1350) Dr. Scott also gave specific accounts of the physical abuse Miller suffered from his father stating that Ivan "frequently bullied and left bruises on [Miller]; Dr. Scott also related a specific incident when Ivan threatened to stab Miller with a butcher knife after Miller returned from school. (R. 1350-51) Dr. Scott also testified regarding Ivan's drug use and his obsession with cult-like healing practices. Id. Finally, Dr. Scott testified that Miller often witnessed Ivan's verbal and physical abuse of his mother, Barbara. (R. 1351)

As the trial record indicates, the information concerning Miller's abusive and unstable childhood that he claims his trial counsel were ineffective for not adequately investigating was presented substantially during the penalty phase of Miller's trial. Miller cannot

establish that he was prejudiced by his trial counsels' performance and accordingly, he has failed to meet his burden of proof. Therefore, this claim is denied.

2. Miller's Claim That Trial Counsel Failed To Obtain Miller's Medical Records.

In paragraphs 66-74 of his amended petition, Miller alleges that his trial counsel failed to obtain his medical records. (Pet. at 20) Miller claims that had his trial counsel obtained these records, they would have provided information concerning injuries Miller received as a result of physical abuse and would have been useful medical background information for Dr. Scott.

This claim is dismissed for failing to meet the specificity requirements of Rule 32.6(b) of the Alabama Rules of Criminal Procedure. Miller has failed to state which specific hospitals and what specific records his trial counsel should have obtained. Instead, Miller vaguely alleges that his trial counsel should have acquired records from three unnamed hospitals. Additionally, Miller failed to present any evidence during the evidentiary hearing regarding what specific hospital records his trial counsel should have investigated. Because this Court finds

that this claim fails to meet the specificity requirements of Rule 32.6(b), it is dismissed. Ala. R. Crim. P. 32.7(d).

This claim is also denied because Miller has failed to meet his burden of proof of establishing that his trial counsel were deficient under Strickland, 466 U.S. at 687. Ala. R. Crim. P. 32.7(d). Although trial counsel Johnson testified that he did not present Miller's medical records during trial, Miller failed to elicit any testimony during the evidentiary hearing from Johnson as to whether Johnson investigated or attempted to obtain Miller's medical records. (Rule 32 R. 184) Therefore, because the record is silent regarding trial counsel's investigation of Miller's medical records, and because trial counsels' conduct is presumed to be reasonable, this Court should also presume that trial counsels' investigation of Miller's medical history was reasonable. Chandler v. United States, 218 F.3d 1305, 1315 n.15 (11th Cir. 2000)("An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption [because] 'where the record is incomplete or unclear about [counsel's] actions, [the court] will presume that he did what he should have done, and that he exercised reasonable professional judgment.'")

This claim is also denied by this Court because Miller has failed to meet his burden of proof of establishing that he was prejudiced by his trial counsels' alleged failure to obtain his medical records. See Strickland, 466 U.S. at 687; Ala. R. Crim. P. 32.7(d). Testimony was presented by Dr. Scott during the penalty phase of trial regarding injuries Miller received as a child - the exact information Miller now claims his trial counsel failed to investigate and provide to Dr. Scott. Dr. Scott not only testified about head injuries Miller received as a child, but also stated that there was no evidence of a current head injury. Specifically, Dr. Scott testified that Miller:

> "had five or six different head injuries as a kid. So we got a neuro-imaging scan, I asked for that, and it came back that there wasn't any evidence of a head injury, that can come up on a neurological scan.
> So in my mind that is another reason that it's unlikely to be a mental defect explaining this crime."

(R. 1360) Miller also failed to present any evidence during the evidentiary hearing pertaining to specific medical records or specific injuries Miller sustained as a child. Notably, Miller's own expert, Dr. Catherine Boyer testified that she did not have any indication of the cause of Miller's injuries and was not aware of any medical records

indicating that Miller had any overnight hospitals stays as a result of his injuries. (Rule 32 R. 739-40) Accordingly, Miller has failed to establish that he was prejudiced by his trial counsels' investigation of his medical records and therefore, this claim is denied.

3. Miller's Claim That Trial Counsel Failed To Investigate Evidence of His Good Character And Family and Personal Relationships.

In paragraphs 75-95 of his amended petition, Miller claims that his trial counsel failed to adequately interview family mitigation witnesses that could have provided positive evidence of his good character. Miller alleges that such an investigation would have uncovered mitigating evidence that he was a quiet, peaceful man, that he provided for his family, that he was dependable and loving, that he did not drink or do drugs, and that he kept to himself. (Pet. at 22)

This Court denies Miller's claim because he has failed to meet his burden of proof of establishing that his trial counsel were deficient under Strickland, 466 U.S. at 687. Ala. R. Crim. P. 32.7(d). As noted above, Johnson and Bass did interview multiple members of Miller's family including his mother Barbara, his brother, Richard, his sister, Lisa,

and his cousin Brian. (Rule 32. 38-39, 163-65) Johnson testified that in preparation for the penalty phase, he spoke with both Barbara and Richard Miller. (Rule 32 R. 158-59) Although Johnson had no specific recollection of questions he may have asked Miller's family members concerning his positive attributes, Johnson testified that he and co-counsel Bass would have talked with any family member that they thought might have had helpful information. (Rule 32 R. 160-61) Therefore, trial counsel's performance involving the investigation of Miller's character should be presumed to be reasonable. See Chandler, 218 F.3d at 1315 n.15.

In his amended petition, Miller still claims that trial counsel should have conducted further interviews of family members in order to discover possible positive evidence, namely though the testimony of his niece, Alicia Sanford, and his nephew Jack Connell. (Pet. at 24-27) However, contrary to Miller's claims, "[a] defense attorney is not required to investigate all leads" and there is "no absolute duty to present mitigating character evidence at all." Gaddy v. State, 952 So. 2d 1149, 1170-71 (Ala. Crim. App. 2006). Johnson testified during the evidentiary

hearing that he was not familiar with either Alicia Sanford or Jake Connell. (Rule 32 R. 162) As noted above, Johnson had good reason not to be aware of either Sanford or Connell. Sanford was 14 years old at the time of trial, and neither Sanford nor Connell attended Miller's trial. (Rule 32 R. 498-99, 584-85) Miller has failed to present any evidence that a reasonable attorney should have been aware of these witnesses and additionally, would have conducted interviews of these witnesses. Accordingly, based on the evidence presented during the evidentiary hearing, trial counsels' investigation of Miller's character through the interviews of family members was reasonable, and Miller has failed to present any evidence to the contrary. Therefore, this claim is denied.

This claim is also denied by this Court because Miller has failed to meet his burden of proof of establishing that he was prejudiced by his trial counsels' alleged failure to adequately investigate positive evidence of his character. See Strickland, 466 U.S. at 687; Ala. R. Crim. P. 32.7(d). As Johnson testified during the evidentiary hearing, much of the positive evidence of Miller's life was presented during the penalty phase though Dr. Scott's testimony.

(Rule 32 R. 174, 246) Dr. Scott testified that he interviewed Barbara Miller, Richard Miller and Cheryl Ellison. (Rule 32 R. 315)

Because of this investigation, Dr. Scott was able to present evidence on the positive aspects of Miller's character intertwined throughout his testimony focusing on Miller's mental health to the jury. The penalty phase record of Miller's trial demonstrates that Dr. Scott presented in substance the exact evidence regarding his good character that Miller now claims his trial counsel failed to investigate. Dr. Scott provided testimony on Miller's demeanor and personality and noted that Miller did not exhibit aggressive or violent behavior as a child and did not get into many fights while in school. (R. 1352) Dr. Scott also testified that Miller had a great relationship with his mother, supported his family and used most of the money earned from his various jobs to provide for his family. (R. 1350, 1352, 1363) Evidence was also presented that, despite his father, Ivan's behavior, Miller had no significant history of drug or alcohol abuse and that he mostly kept to himself. (R. 1354-56.) Because evidence of his good character, his non-aggressive nature, and the

absence of a significant substance history was presented during trial, Miller has failed to establish how he was prejudiced by his trial counsels' investigation into his character; therefore, this claim is denied.

4. Miller's Claim that Trial Counsel Failed to Investigate Mental Health Evidence to Support Defense Theories in the Guilt and Penalty Phases.

In paragraphs 96-132 of his amended petition, Miller alleges that his trial counsel failed to investigate and develop mental health evidence. Miller claims that had his trial counsel more adequately investigated his mental health, such evidence could have supported an insanity defense, could have negated elements of the capital murder offense during the guilt phase and could have been presented during the penalty phase as mitigation evidence. (Pet. at 27) Furthermore, Miller claims that trial counsel failed to provide adequate mental health information to Dr. Scott and Dr. McDermott and thus prevented a reasonable assessment of his mental health. (Pet. at 27) Specifically, Miller alleges that his trial counsel were ineffective for failing to investigate and provide to Dr. Scott interviews of Miller's co-workers, his medical records, Dr. McClaren's report of his evaluation of Miller,

and the medical records of his grandfather Hubert Miller, his great-grandmother Victoria Granade, his father Ivan Miller, his uncle Perry Miller, and his sister Lisa Carden. (Pet. 27-38)

This Court denies Miller's claim because he failed to meet his burden of proof of establishing that his trial counsel were deficient under Strickland, 466 U.S. at 687. Ala. R. Crim. P. 32.7(d). In essence, Miller is alleging that his trial counsel should have done something more — i.e., that they should have conducted more investigation of his mental health history. When a claim is raised that trial counsel should have done something more, this Court must first look at what trial counsel did. Chandler, 218 F.3d at 1320 ("Although Petitioner's claim is that his trial counsel should have done something more, we first look at what the lawyer did in fact.").

Contrary to Miller's claims, as the Court of Criminal Appeals has previously held regarding this issue on direct appeal, "[t]his is not a case where counsel failed to investigate a potential mental-health defense or neglected to interview potential defense witnesses." Miller v. State, 913 So. 2d 1148, 1161 (Ala. Crim. App. 2004). Instead,

Miller's mental health was of chief concern, initially trial counsels' main theory of defense and ultimately became the central focus of Miller's penalty phase strategy.

The record demonstrates that trial counsel conducted an extensive and thorough investigation of Miller's mental health. Miller, through trial counsel, originally pleaded not guilty by reason of insanity. (C. 1) Trial counsel Johnson was familiar with mental disease defenses based on his previous involvement in capital murder cases in which psychological issues had been raised. (Rule 32 R. 211) Based on the interviews of his family, Johnson discovered Miller's family history of mental illness. (Rule 32 R. 252) Johnson also was aware that Miller had difficulty early on remembering specific facts relating to the actual shootings and that Miller had been given a mental evaluation at Taylor Hardin Medical Facility. (Rule 32 R. 42, 44-45)

As a result, Johnson motioned the trial court to grant additional funds to hire psychological expert assistance. (C. 50-55.) The trial court granted the motion and Johnson retained Dr. Charles Scott to conduct psychiatric and psychological evaluations of Miller in order to determine

whether an insanity defense would be justified. (Rule 32 R. 48.) In preparation for Dr. Scott's evaluation, Johnson forwarded over ninety three pages of materials to Dr. Scott including numerous witness statements, statements from Miller's co-workers, police incident reports, and a copy of Dr. James Hooper's evaluation of Miller at Taylor Hardin. (R. 1345, Rule 32 R. 63, 318)

In response to Dr. Scott's request to interview Miller's family members who were living with him at the time of the shootings, Johnson arranged for Dr. Scott to interview Miller's mother Barbara, his brother Richard, and his sister, Cheryl. (Rule 32 R. 314-15) Johnson also attempted to obtain the records of Miller's grandfather Hubert Miller, but was unsuccessful. (Rule 32 R. 252) Dr. Scott never testified that he was not provided with any document that he specifically requested from trial counsel; Johnson confirmed this fact stating that "I don't think that Dr. Scott asked for anything that was not supplied." (Rule 32 R. 76)

After compiling this information, Johnson interviewed and evaluated Miller over a three day period. (Rule 32 R. 314) Dr. Scott also enlisted the services of a

psychologist, Dr. Barbara McDermott, who conducted a psychological evaluation of Miller. (Rule 32 R. 315-16) After the evaluation was completed, Dr. Scott diagnosed Miller with having a delusional disorder and a psychiatric personality disorder; however, Dr. Scott concluded that Miller was not unable to appreciate the wrongfulness of his actions and therefore did not qualify under Alabama's legal definition for insanity. (Rule 32 R. 325-26, 335.)

Still, after withdrawing the insanity plea, Johnson discussed with Dr. Scott the prospect of providing testimony on Miller's behalf during trial. (Rule 32 R. 253.) Johnson then presented Dr. Scott during the penalty phase of Miller's trial and elicited testimony concerning both Miller's social history and his opinion that Miller suffered from a delusional disorder. (R. 1343-1391.) Dr. Scott also opined that due to his delusional disorder, Miller met the requirements for two statutory mitigating circumstances: that his capacity to appreciate the criminality of his conduct was substantially impaired under Ala. Code § 13A-5-51(6) and that the capital offense was committed while Miller was under the influence of extreme mental disturbance under Ala. Code § 13A-5-51(2). (R.

1391.) Subsequently, the trial court found both of these mitigating circumstances to exist in Miller's case. Miller v. State, 913 So. 2d 1148, 1169 (Ala. Crim. App. 2004).

Trial counsels' investigation into Miller's mental health was reasonable and Miller has failed to meet his burden of establishing deficient performance. Contrary to Miller's claims, trial counsel attempted to obtain the mental health records of his grandfather, Hubert Miller, but was unsuccessful. (Rule 32 R. 252) Miller has not presented any evidence that trial counsel's attempts were unreasonable. Even if trial counsel had not attempted to obtain Miller's family mental health records, Miller cannot demonstrate that trial counsels' performance in this regard was deficient. Miller failed to present any evidence that Dr. Scott specifically requested such records and Miller failed to prove that a reasonable, competent attorney would have independently obtained and presented the mental health records of a defendant's extended family. Notably, the evidence indicates a reasonable attorney would not have investigated and presented such records. Miller's trial counsel, Mickey Johnson and Ronnie Blackwood, as well as his appellate counsel, Billy Hill and Harran Lowe, all

testified that in their numerous years of criminal experience, none had ever introduced the mental health or medical records of a defendant's family. (Rule 32 R. 253, 872; Rule 32 R2. 68-69, 103)

Johnson also provided Dr. Scott a copy of Dr. Hooper's report of his psychological evaluation of Miller. (Rule 32 R. 318) Although not alleged in the petition, during the evidentiary hearing Miller questioned Dr. Scott on whether Johnson also provided Dr. Hooper's backup or underlying file as part of the documents Johnson provided to Dr. Scott. (Rule 32 R. 320) However, Miller has failed to produce any evidence that Johnson had access to or could have obtained Dr. Hooper's underlying file. Moreover, Miller has not established that a reasonable attorney would have provided another expert's underlying file to an expert retained to conduct psychiatric evaluations on a defendant. For the foregoing reasons, Miller has failed to satisfy his burden of proving deficient performance under Strickland with regard to his claim that his trial counsel failed to investigate mental health evidence; therefore, Miller's claim is denied.

This Court also denies this claim because Miller has failed to meet his burden of proof of establishing that he was prejudiced by his trial counsels' alleged failure to adequately investigate mental health evidence. See Strickland, 466 U.S. at 687; Ala. R. Crim. P. 32.7(d). Even if Miller could have proven that his trial counsels' performance were deficient in failing to provide certain records to Dr. Scott, Miller failed to elicit any testimony from Dr. Scott that his report was incomplete or inaccurate due to a lack of necessary records or information. While Dr. Scott testified that additional information "could" have been important in his evaluation, he failed to state how his evaluation was inadequate, specifically in regards to documenting Miller's mental health problems. (Rule 32 R. 362-65)

Furthermore, Miller has failed to demonstrate prejudice under Strickland because the record indicates that the additional information he claims his trial counsel should have provided to Dr. Scott did not contain any additional information that Dr. Scott was not already made aware of during his evaluation. For instance, Miller claims that his trial counsel was ineffective for failing to provide

Dr. Scott a copy of Dr. McClaren's report of his evaluation of Miller. (Pet. at 29) During the evidentiary hearing, Miller attempted to show Dr. McClaren's report would have been significant to Dr. Scott because Dr. McClaren documented that Miller claimed amnesia during the shootings, that Dr McClaren opined that a period of dissociation was possible after Miller reported experiencing "tunnel vision", and because the report noted that Miller was confused as to why he was arrested.

However, Dr. Scott was already aware that Miller claimed to have difficulty remembering the events and circumstances of the shootings. Dr. Scott testified during the penalty phase of trial that Miller "had difficulty recalling what happened and questioned the events had even occurred." (R. 1378) Dr. Scott also noted Miller's difficulty remembering the shootings in his report and reported that Miller "wondered if it was a bad dream." (Petitioner's Ex. 29-0010) Dr. Scott also was provided with the psychological report of Dr. Hooper, which stated that Miller "has no memory of the index events." (Petitioner's Ex. 29-0208)

Although Miller contends that it was significant that Dr. McClaren listed the possibility of a brief period of dissociation because of Miller's self-report of experiencing "tunnel vision", ultimately, Dr. McClaren did not diagnose Miller with any type of dissociative disorder. (Petitioner's. Ex 27-0039.) Moreover, Dr. Scott was also aware that Miller claimed to experience "tunnel vision" and included this fact in his own report. (Petitioner's Ex. 29-0010.) Thus, Dr. Scott had access to the very same information that led Dr. McClaren to suggest the possibility of a period of dissociation.

Finally, Dr. Scott was also aware that Miller had a confused state of mind at the time he was arrested by law enforcement officials. As Dr. Scott stated in his report,

> "[Miller] said that the first time he realized that police were following him occurred when he heard the sirens and he felt that his 'thoughts were spinning.' When asked to describe this he said that he had brief thoughts of the shootings and thought that 'this didn't make sense. I couldn't explain it.'"

(Petitioner's Ex. 29-0010) Dr. Scott also reported that at the time he was arrested, Miller recalled being "somewhat confused and thought that he might go home and wondered 'why was I going home'" and that after being taken to jail,

"when he first woke up, he thought he might be at home but when he recognized that he was in jail he realized that the 'thoughts in my mind might be real.'" (Petitioner's Ex. 29-0010-0011) Because the record indicates Dr. Scott had knowledge of substantially the same information contained in Dr. McClaren's report, Miller has failed to demonstrate how the failure to provide Dr. McClaren's report impacted Dr. Scott's evaluation. Therefore, Miller cannot demonstrate a reasonable probability that the result of his proceeding would have been different.

Dr. Scott also had knowledge of Miller's family history of mental illness. In his report, Dr. Scott devoted a section to Miller's "Family Psychiatric History" and discussed that Ivan Miller exhibited unusual behavior, that Miller's grandfather, Hubert Miller, had been committed to a psychiatric institution, and that his brother Richard was described as "slow." (Petitioner's Ex. 29-0006) This information was then presented to the jury during Dr. Scott's penalty phase testimony. (R. 1362-63) During the evidentiary hearing, Dr. Scott testified that a family history of psychotic disorders could impact the vulnerability and likelihood that an individual would have

a mental disorder. (Rule 32 R. 307) Therefore, because he was aware that Miller's family had a history of psychiatric problems, Dr. Scott had readily available information suggesting Miller would be more vulnerable to having a mental disorder.

Although Miller now claims that his trial counsel should have also provided the mental health records of his great-grandmother Victoria Granade, his father, Ivan Miller and his uncle James Miller, Miller has failed to present any evidence that these individuals were diagnosed with specific psychological or psychiatric disorders or how such undiagnosed mental illnesses could have impacted Miller's diagnosis. Similarly, although Miller claims the records of his grandfather Hubert Miller, which report a diagnosis of paranoid schizophrenia, and the records of his uncle Perry Miller, which report a diagnosis of bipolor disorder, should have been provided to Dr. Scott, he failed to specifically present evidence regarding how these precise diagnoses specifically impacted Dr. Boyer's diagnosis of post-traumatic stress disorder. (Rule 32 R. 644-48) Nor did Miller demonstrate how the absence of these specific records specifically distorted or affected Dr. Scott's

evaluation. Therefore, because trial counsel did provide information to Dr. Scott to inform him of Miller's family history of mental illness and because Miller has failed to establish specific psychiatric diagnoses in his family's mental records that would have changed Dr. Scott's evaluation, Miller has failed to demonstrate that he was prejudiced by the failure to provide family mental health records to Dr. Scott.

Miller was also not prejudiced by his trial counsels' provision of information to Dr. Scott regarding the extent and nature of physical abuse that Miller suffered as a child. Dr. Scott was informed and had knowledge that Ivan Miller physically abused Miller. Dr. Scott noted in his report that Ivan was "physically abusive and frequently hit [Miller] on various areas of his body with his hands or with a belt." (Petitioner's Ex. 29-0003) Dr. Scott also testified concerning Ivan's physical abuse of Miller during the penalty phase of Miller's trial. (R. 1350-51.)

Miller now claims that his trial counsel was ineffective for not providing Dr. Scott more information on the details of the abuse. However, Dr. Scott was aware of specific incidents of abuse and testified during the

penalty phase about an occasion when Ivan tried to stab Miller. (R. 1351) Notably, Miller failed to present any further evidence during the evidentiary hearing of specific details or occurrences of physical abuse. In fact, none of Miller's reported injuries were linked to any form of abuse; Miller's expert Dr. Boyer testified that there was no indication in Miller's medical records how any of his injuries occurred and that there were no serious wounds that required overnight hospital stays. (Rule 32 R. 740) The record indicates that Dr. Scott was aware of the nature of Ivan's physical abuse; Miller has failed to provide any evidence of other specific incidents of abuse or how such undocumented incidents would have impacted Dr. Scott's analysis. Accordingly, Miller has failed to demonstrate that he was prejudiced.

Although not alleged in his amended petition, Miller attempted to suggest during the evidentiary hearing that trial counsel was ineffective for not submitting to Dr. Scott an audio/videotape of Miller's statement to police. (Rule 32 R. 78-79) However, the audio/videotape of Miller's statement was not submitted into evidence during the evidentiary hearing. (Rule 32 R. 529) Miller also

failed to present any proof of what actual evidence was contained on the audio/videotape. Therefore, because there is nothing in the record indicating what was contained in this evidence, Miller cannot establish how he was prejudiced by his trial counsel not providing the audio/videotape to Dr. Scott.

Most importantly, Miller has failed to demonstrate a reasonable probability that the outcome of his proceeding would have been different had his trial counsel investigated more mental health evidence because he has failed to prove that he met the legal definition of insanity under Ala. Code § 15-16-1. None of the five psychological and psychiatric experts who evaluated Miller during the course of his trial or his Rule 32 proceeding, including Drs. Hooper, Scott, McDermott, McClaren, and Boyer concluded that Miller was legally insane. Therefore, even if trial counsel had conducted a more thorough mental health investigation, the result would be the same: Miller could not have proven that he did not appreciate the wrongfulness of his actions and thus could not have sustained a not-guilty by reason of insanity defense.

Miller's failure to demonstrate prejudice is highlighted by the testimony of Miller's own expert, Dr. Boyer, during the evidentiary hearing. Despite her opinion that Miller suffered from post-traumatic stress disorder, incredibly, Dr. Boyer failed to testify that Miller was legally insane. (Rule 32 R. 757-58) Notably, Dr. Boyer failed to even provide an opinion. Clearly evading the issue of Miller's sanity, in response to a question regarding whether she disagreed with Dr. Scott's testimony during trial that Miller was not insane, Dr. Boyer testified "I really don't know if I can answer it." (Rule 32 R. 757)

As Dr. Boyer stated in response to a question from counsel for the State, if she had been called to testify on Miller's behalf during trial, she would have had no opinion as to whether he could appreciate the wrongfulness of his conduct at the time of the shootings:

> Q: So in this case it's fair to say that had you been there you would have said I have no opinion [as to Miller's sanity] one way or the other?
>
> A: Yes

(Rule 32 R. 758) Without offering a opinion, let alone an opinion that conflicted with the evaluations performed

during trial, even if a mental health investigation was performed in the manner in which Miller now alleges it should have been conducted, Miller has failed to demonstrate a reasonable probability that additional mental health evidence would have been uncovered that would have affected the outcome of his trial. It is also significant that Dr. Scott failed to state during the evidentiary hearing that his opinion that Miller was not insane at the time of the shootings had changed. No evidence has been presented that Miller was legally insane and ample mental health evidence was already available for trial counsel to effectively argue during the penalty phase that Miller satisfied the requirements for the statutory mitigating circumstances under Ala. Code § § 13A-5-51(2), (6).

Three psychologists and one psychiatrist evaluated Miller at the time of trial; none of these four doctors, whether hired by the defense or appointed by the trial court, found that Miller was insane. (Rule 32 R. 248) Miller has offered nothing in the testimony of either Dr. Boyer or Dr. Scott to call these evaluations into question. There is no evidence that Dr. Boyer's testimony would have benefited Miller's defense, nor would it have impacted the

outcome of the proceedings. Miller has failed to meet his burden of proof of demonstrating how he was prejudiced under Strickland by his trial counsels' investigation into his mental health. Therefore, Miller cannot demonstrate that his trial counsel's performance in this regard was constitutionally ineffective and thus, this claim is denied.

B. Miller's Claim That His Trial Counsels' Pre-Trial Performance Was Ineffective.

In paragraphs 133-155 of his amended petition, Miller raises several instances in which he claims his trial counsels' performance was constitutionally ineffective. Each of Miller's claims is addressed individually below:

1. Miller's Claim That His Trial Counsel Failed To Seek A Continuance When Co-Counsel Bass Withdrew Before Trial.

In paragraphs 133-137 of his amended petition, Miller claims that trial counsel Johnson was ineffective for failing to request a continuance at trial after his co-counsel, Rodger Bass, withdrew from his representation of Miller approximately a month before trial. (Pet. At 39) Miller claims that because Bass' time records indicate that he spent more out-of-court time investigating Miller's case than Johnson, and because Bass' replacement, Ronnie

Blackwood had less experience than Bass, Johnson was not prepared to effectively represent Miller.

This Court finds that Miller has failed to present any argument or evidence in support of this claim during the evidentiary hearing and therefore, this claim is denied. Therefore, Miller has abandoned this claim. See Brooks v. State, 929 So. 2d 491, 498 (Ala. Crim. App. 2005)(holding that a Rule 32 petitioner's failing to ask counsel "any questions concerning her reasons for not pursuing any of the claims" in the Rule 32 petition constitutes an abandonment of those issues). There is a strong presumption that counsel's performance was within the "wide range of reasonable professional assistance." Grayson v. Thompson, 257 F.3d 1194, 1216 (11th Cir. 2001). During the evidentiary hearing, Miller failed to ask trial counsel Johnson *why* he did not seek a continuance for Miller's trial after Bass' withdrawal. Because Ala. R. Crim. P. 32.3 places the burden of proof squarely on Miller and because the record indicates that Miller did not pursue this claim, this Court presumes that trial counsel acted reasonably in proceeding to trial with Miller's case. See Chandler, 218 F.3d 1305, 1315 n.15 (11th Cir. 2000)("An

ambiguous or silent record is not sufficient to disprove

ambiguous or silent record is not sufficient to disprove the strong and continuing presumption [because] 'where the record is incomplete or unclear about [counsel's] actions, [the court] will presume that he did what he should have done, and that he exercised reasonable professional judgment.'")

In the alternative, even if Miller had pursued this claim during the evidentiary hearing, the record demonstrates that trial counsel was adequately prepared for trial and was not ineffective for failing to seek a continuance after Bass withdrew from representation. While Bass conducted certain aspects of the pre-trial investigation, Johnson testified that "[i]f either one of us had information [that] would have been relevant or useful to Mr. Miller's case we would have shared it." (Rule 32 R. 215)

Furthermore, Johnson stated that the majority of the preparation for Miller's defense was already completed by the time Bass withdrew and that Bass "would have taken a secondary role anyway." Id. Johnson also testified that he was comfortable with Blackwood being appointed co-counsel in Bass' place and that Bass was still accessible to answer

any questions concerning the case. (Rule 32 R. 215-16) Blackwood testified that trial counsel were prepared for trial and would not have proceeded to trial if they felt that they were not prepared. (Rule 32 R. 871) There is no evidence that trial counsel were deficient for proceeding to trial after Bass withdrew from his representation of Miller or that Miller was prejudiced by his trial counsel not seeking a continuance of his trial after Bass' withdrawal. Therefore, this claim is denied.

2. Miller's Claim That His Trial Counsel Erroneously Withdrew The Insanity Defense Before Trial.

In paragraphs 138-147 of his amended petition, Miller claims that his trial counsels' decision to withdraw the insanity defense was unreasonable. Miller alleges that trial counsels' reliance on Dr. Scott and Dr. McDermott's evaluations in deciding to withdraw the not guilty by reason of insanity plea was ineffective because he claims trial counsel did not provide Dr. Scott with adequate background information to support the evaluation. (Pet. at 40) Miller also claims that Dr. Scott's ultimate conclusion that Miller was not insane was "equivocal" and that trial counsel should have provided additional

information and documents to Dr. Scott and sought additional expert opinion. (Pet. at 42)

This Court denies Miller's claim because he has failed to meet his burden of proof of demonstrating that his trial counsels' performance was deficient under Strickland. 466 U.S. at 688; Ala. R. Crim. P. 32.7(d). Miller's trial counsel could not be deficient for withdrawing the insanity defense because none of the psychological or psychiatric experts who evaluated Miller before trial concluded that Miller met the legal definition for insanity.

Miller, through counsel, originally pled not guilty by reason of mental disease or defect. (C. 1) To qualify under the legal definition of insanity, Miller bore the burden of demonstrating that he "was unable to appreciate the nature and quality or wrongfulness of his acts." Ala. Code § 13A-3-1. However, as demonstrated during trial and the evidentiary hearing, none of the four mental health experts who examined Miller concluded that he was unable to appreciate the nature and quality of his actions. (R. 1384, R2. 72-74, Rule 32 R. 248)

Dr. James Hooper, a psychologist at the Taylor Hardin Medical Facility, first evaluated Miller and concluded in

his report on October 8, 1999 that Miller "does not have a mental illness that would have compromised his understanding of the nature, quality, or wrongfulness of his behavior." (Petitioner's Ex. 29-0211) Dr. Harry McClaren, a psychologist hired by the State of Alabama, also evaluated Miller to determine whether Miller qualified under Alabama's insanity statute. On December 2, 1999, Dr. McClaren ultimately concluded that Miller did not meet the legal definition of insanity and that there was no evidence that he was unable to appreciate the nature and quality of his actions. (Petitioner's Ex. 27-0033)

Finally, as noted above, trial counsel retained Dr. Charles Scott, a psychiatrist, for the purpose of determining whether Miller was legally insane at the time of the shootings. Dr. Scott engaged in an extensive evaluation of Miller including a three day-assessment of Miller himself, interviews of family members, and the examination of numerous documents and reports. (R. 1345-48) Dr. Scott also retained Dr. Barbara McDermott to administer various psychological tests to Miller. (Rule 32 R. 316) However, after concluding this investigation, Dr. Scott stated in his report that in his opinion, Miller was not

unable to appreciate the nature and quality of his actions or the wrongfulness of his conduct. (Petitioner's Ex. 29-0022, R. 1384, Rule 32 R. 251)

Thus, trial counsel could not have provided any expert opinion testimony to credibly argue to the jury that Miller was legally insane. Any argument that Miller was legally insane could have been effectively rebutted from Miller's own expert's conclusion that he was not insane. (R. 1384) Johnson testified that he was aware of each of these reports and that neither Dr. Hooper's, nor Dr. McClaren's, nor Dr. Scott's reports conflicted on the issue of Miller's sanity at the time of the offense. (R2. 73-74, Rule 32 R. 251) Johnson testified that after receiving Dr. Scott's report he discussed the findings with Dr. Scott and ultimately decided to withdraw the insanity defense on May 24, 2000. (Rule 32 R. 91-92) Johnson stated during the evidentiary hearing that if any of the four doctors who evaluated Miller had declared that Miller was insane at the time of the offense, such a finding would have altered his strategy and that he would have used that opinion as part of his defense. (Rule 32 R. 248)

Trial counsels' decision to withdraw the insanity plea was not an unreasonable decision. The withdrawal of the insanity defense was the product of a strategic decision made after both consultation with a mental health expert hired for the express purpose of evaluating Miller's sanity and consideration of additional investigation and expert opinions. Based on the unequivocal conclusions of all four examining doctors that Miller was not unable to appreciate the wrongfulness of his actions at the time of the offense, trial counsel's decision to withdraw the not guilty by reason of insanity plea was not deficient and entirely reasonable based on the information and evidence available to trial counsel. Therefore, this claim should be denied.

This claim is also denied because Miller has failed to meet his burden of proof of demonstrating that he was prejudiced by his trial counsels' performance. See Strickland, 466 U.S. at 695; Ala. R. Crim. P. 32.7(d). Miller was not prejudiced by his trial counsels' withdrawal of the insanity plea because no evidence has been presented during the evidentiary hearing that Miller could not appreciate the wrongfulness of his actions and therefore

would have been eligible for a not guilty by reason of mental defect or insanity plea.

Although Miller now claims that his trial counsel should have presented more information to Dr. Scott or obtained an additional expert opinion regarding Miller's sanity, the record indicates that even if such additional measures were taken, the result would be the same: that Miller does not meet the requirements for insanity under Alabama law. At the evidentiary hearing, Dr. Boyer testified that in her opinion, Miller experienced a dissociative episode at the time of the shootings and that this opinion would be important as a mental health professional in determining whether Miller was sane or insane at the time of the shootings. (Rule 32 R. 719-20)

However, incredibly, Dr. Boyer never testified that in her opinion, Miller was legally insane at the time of the shootings. When pressed on this crucial question by counsel for the State, Dr. Boyer stated "I really don't know if I can answer it." (Rule 32 R. 757) Most importantly, Dr. Boyer testified that after her complete investigation, if she had been called to testify as to Miller's sanity at the time of trial, she would have had no

opinion. (Rule 32 R. 758) Therefore, Miller has failed to present any evidence that a mental health expert would have been available to testify at trial that Miller was insane at the time of the shootings.

Miller also failed to present any evidence during the evidentiary hearing that conflicts with the evidence and expert opinion regarding Miller's sanity at the time of trial. Dr. Scott never testified that his opinion at the time of trial that Miller was not unable to appreciate the nature and quality or wrongfulness of his actions had changed. Although Dr. Scott stated that it was "possible" that had he obtained additional information and conducted additional testing relating to a dissociative disorder his diagnosis could have changed, he failed to testify that such information did in fact change his opinion. (Rule 32 R. 364) Like Dr. Boyer, Dr. Scott never testified that in his opinion, Miller met the requirements for insanity under Alabama law.

Equally as important in determining that Miller was not prejudiced by the withdrawal of the insanity plea was the testimony of Dr. McClaren during the evidentiary hearing. Before trial in the fall of 1999, Dr. McClaren was hired to

conduct a forensic psychological evaluation of Miller. (Rule 32 R. 773) After conducting his evaluation, Dr. McClaren concluded that Miller was a "non psychotic man of average intelligence." (Rule 32 R. 778) Dr. McClaren also concluded that Miller was not insane under Alabama law at the time of the offense. (Rule 32 R. 780)

After becoming involved in the case again for purposes of this Rule 32 proceeding, Dr. McClaren testified that he reviewed additional testimony, the reports of Dr. Scott and Dr. McDermott, additional psychological testing, school records as well as the testimony during the evidentiary hearing. (Rule 32 R. 783-84) Dr. McClaren then testified that after his review of this new information, nothing had changed his opinion that Miller was not legally insane at the time of the shootings. (Rule 32 R. 784) In Dr. McClaren's opinion, Miller functioned as a non psychotic man at the time of the shootings. (Rule 32 R. 792)

The testimony of all three mental health experts during the evidentiary hearing as well as the evidence contained in the mental health reports issued during trial and the trial record itself are consistent: all indicate that Miller was not unable to appreciate the nature and quality

or wrongfulness of his actions. No testimony has even been presented during trial or in this Rule 32 proceeding that Miller was insane at the time of the shootings under Alabama law. Therefore, Miller has failed to demonstrate a reasonable probability that the outcome of his proceeding would have been different had trial counsel not withdrawn the insanity plea because the record resoundingly evidences that Miller was in fact not insane at the time of the shootings. Accordingly, because Miller has failed to demonstrate prejudiced under Strickland, this claim is denied.

3. Miller's Claim That His Trial Counsel Failed To Move For A Change Of Venue Despite Extensive Pre-Trial Publicity.

In paragraphs 148-155 of his amended petition, Miller claims that his trial counsel were ineffective for failing to move for a change of venue based on the amount of pre-trial publicity.

This Court finds that Miller failed to pursue this claim during the evidentiary hearing and offered no evidence in support of his claim of ineffective assistance of trial counsel on this issue. In fact, Miller's post-conviction counsel specifically informed this Court that

potential exhibits purporting to contain newspaper articles regarding the shootings and Miller's subsequent trial were not being offered into evidence as support for a change of venue argument. (Rule 32 R. 115, 118)

Therefore, this claim is denied by this Court because Miller has abandoned this claim. See Brooks v. State, 929 So. 2d 491, 498 (Ala. Crim. App. 2005) (holding that a Rule 32 petitioner's failing to ask counsel "any questions concerning her reasons for not pursuing any of the claims" in the Rule 32 petition constitutes an abandonment of those issues). See also Chandler v. United States, 218 F.3d 1305, 1314 n. 15 (11th Cir. 2000) ("An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption [because] 'where the record is incomplete or unclear about [counsel's] actions, [the court] will presume that he did what he should have done, and that he exercised reasonable professional judgment.'"); Payne v. State, 791 So. 2d 383, 399 (Ala. Crim. App. 1999) ("Because it appears that Payne did not present evidence at the evidentiary hearing with regard to [Payne's claims], we conclude that he has abandoned these claims and we will not review them.").

There is a strong presumption that counsel's performance was within the "wide range of reasonable professional assistance." Grayson, 257 F.3d at 1216. During the evidentiary hearing, Miller failed to ask trial counsel why he did not move for a change of venue. Because Ala. R. Crim. P. 32.3 places the burden of proof squarely on Miller and because the record indicates that Miller did not pursue this claim, this Court presumes that trial counsel acted reasonably in proceeding to trial with Miller's case. See Chandler, 218 F.3d at 1315 n.15. Accordingly, Miller's claim is denied.

C. Miller's Claim That Trial Counsels' Performance During The Guilt Phase of Trial Was Ineffective.

In paragraphs 156-222 of his amended petition, Miller raises several instances in which he alleges that his trial counsel were ineffective during the guilt phase of trial. Each claim of ineffective assistance of trial counsel during the guilt phase is addressed individually below:

1. Miller's Claim That Trial Counsel Conducted An Ineffective And Inadequate Juror Voir Dire.

In paragraphs 158-67 of his amended petition, Miller claims that trial counsel Johnson's voir dire was inadequate. (Pet. at 46) Miller alleges that Johnson did

not ask questions related to the jurors' exposure to media coverage of the trial and did not effectively ask questions designed to uncover potential bias against Miller.

This Court denies Miller's claim because he has failed to meet his burden of proof of demonstrating that his trial counsels' performance was deficient under Strickland, 466 U.S. at 687. Ala. R. Crim. P. 32.7(d). Because of the extensive publicity in this case, Johnson, along with the District Attorney's office, developed a written questionnaire that was provided to the entire jury panel. (Rule 32 R. 236) Within the questionnaire, question #68 specifically asked the jurors to answer whether they had seen anything about the case in any newspaper. (Rule 32 R. 237) Additional questions were included in the questionnaire to determine whether a particular juror had such strong fixed opinions about the case or could not be fair or impartial as a juror. (Rule 32 R. 238)

Johnson testified that he had an opportunity to review the responses to the questionnaires for all members of the jury panel and that he knew the jurors' responses identifying what they saw in the newspapers about the case. (Rule 32 R. 237-38) During trial, the trial court and

counsel for both parties conducted an extensive individual voir dire of the jury panel. (R. 130-763)

As the record indicates, Johnson strategically conducted voir dire to determine whether any juror had a fixed opinion, for any reason, of the case. Johnson alerted the trial court to questions #68, #69 and #70 of the juror questionnaire that pertained to the juror's opinions of the case and implored the trial court to focus its questions on whether the jurors had "fixed opinions" of the case. (R. 146-47) As a result, the trial court determined that it would examine each juror's response to question #68 and if the juror indicated they had heard something about the case, the trial court would inquire what the juror heard and whether the juror could set aside what they had heard. (Rule 32 R. 148)

During the evidentiary hearing, Miller's counsel questioned Johnson about specific newspaper articles and then questioned Johnson on whether he asked eight jurors about what they had read about the case in the newspaper. (Rule 32 R. 127-34) However, as the record indicates, as a result of Johnson's effort, during individual voir dire, the trial court noted each of the eight juror's responses

to question #68 indicating that the juror had seen or read something about the case and then asked each juror whether they could set what they had learned aside and base their verdict solely on the evidence presented. (R. 337-38, 345-46, 376-77, 446-47, 449-50, 625-26, 638-39, 666-67) All eight jurors indicated that they could set aside what they had learned and sit as a fair and impartial juror. Id.

Therefore, information about the jurors' opinions about the case was brought out during the voir dire and Miller has failed to demonstrate that Johnson's method of conducting voir dire was deficient. Miller has failed to present any evidence that a reasonable attorney would have asked these eight jurors about specific newspaper articles. Furthermore, Miller failed to ask Johnson why he did not strike these eight jurors from the panel, nor did Miller ask any specific question regarding Johnson's strategy for using the defense's peremptory strikes. Therefore, because the record is silent, trial counsel's questioning of the jury panel and the subsequent peremptory strikes is presumed to be reasonable. See Chandler, 218 F.3d 1305, 1315 n.15.

In paragraph 162 of his amended petition, Miller claims that his trial counsel failed to question and remove Juror Gregory Johnson who Miller alleges was biased because Juror Johnson favored the death penalty. (Pet. at 47) However, trial counsel's questioning of Juror Johnson was not deficient and the record directly refutes Miller's claim that Juror Johnson was biased. Juror Johnson stated during voir dire that he could follow the trial court's instructions and listen to the evidence in recommending a sentence in Miller's case. (R. 377-78) Juror Johnson also stated that where it was appropriate under the law and evidence he could vote for either life imprisonment or the death penalty. (R. 378) Furthermore, trial counsel Johnson specifically questioned Juror Johnson about his views on the death penalty and elicited from Juror Johnson that he had no fixed opinions about what an appropriate punishment should be. (R. 387-88) Accordingly, Miller's claim is directly refuted from the record and is denied. See Gaddy v. State, 952 So. 2d 1149, 1161 (Ala. Crim. App. 2006).

Finally, in paragraphs 164-65 of his amended petition, Miller claims that trial counsel were ineffective for failing to question prospective jurors about their

willingness to consider lesser included offenses. However, both the trial record and evidentiary hearing demonstrate that trial counsels' strategy did not involve arguing that Miller was entitled to a lesser included offense. Therefore, trial counsel had a strategic reason for not questioning prospective jurors about lesser included offenses and Miller has failed to demonstrate how trial counsels' voir dire strategy was deficient. See Boyd v. State, 746 So. 2d 364, 375 (Ala. Crim. App. 1999) ("Strategic choices made after a thorough investigation of relevant law and facts are virtually unchallengeable.")

This claim is also denied because Miller has utterly failed to meet his burden of proof of demonstrating that he was prejudiced by his trial counsels' performance during voir dire. See Strickland, 466 U.S. at 695; Ala. R. Crim. P. 32.7(d). Although Miller claims that trial counsel was ineffective for failing to ask eight of the fourteen jurors seated in his case about what they read or remembered about Miller's case, Miller has failed to present any evidence whatsoever about what these eight jurors actually had read or remembered about Miller's case prior to trial. (Rule 32 R. 134) None of the jurors who sat at Miller's trial

testified during the evidentiary hearing. Therefore, no evidence was presented that the eight jurors actually read or were exposed to the newspaper articles introduced into evidence by Miller during the evidentiary hearing. (Rule 32 R. 127-34, 289-95) Even if the eight jurors had read these newspaper articles, no evidence was presented that the jurors considered these articles harmful to Miller or that they had fixed opinions about Miller because of these articles.

There is nothing in the record regarding what the jurors' read about Miller's case; accordingly, "[t]he mere fact that some of the jurors that sat for [Miller's] trial had pretrial knowledge of his case is not enough to establish they were biased against him." Duncan v. State, 925 So. 2d 245, 267-68 (Ala. Crim. App. 2005). Therefore, because there is no evidence about what the jurors read or and whether they were actually biased against Miller because of what they read, Miller has failed to demonstrate that he was prejudiced by his trial counsels' performance during voir dire. Miller's claim is denied.

2. Miller's Claim That Trial Counsel's Opening Statement During The Guilt Phase Was Deficient And Prejudicial.

In paragraphs 168-172 of his amended petition, Miller claims that his trial counsel was ineffective during his guilt phase opening statement. Miller alleges that his trial counsel offered no defense theory and agreed with the facts of the crime by stating that the prosecution's opening statement was a "pretty good recitation of what happened." (Pet. at 49-50)

This Court denies Miller's claim because he has failed to meet his burden of proof of demonstrating that his trial counsels' performance was deficient under Strickland, 466 U.S. at 687. Ala. R. Crim. P. 32.7(d). Johnson consistently testified that because of the overwhelming nature of the evidence in this case, his trial strategy focused on the penalty phase of trial. (R. 14, Rule 32 R. 219) Based on this strategy, Johnson formulated his opening statement with the express purpose of attempting to win favor with the jurors without alienating the jury by presenting frivolous information. (Rule 32 R. 143)

Trial counsel's strategy was evidenced throughout his opening statement during the guilt phase. (R. 813-16)

Johnson told the jury that the defense would keep the burden where it belongs and challenge evidence that was wrong. (R. 813) However, Johnson stated that "[w]e will not engage in frivolity" and repeatedly emphasized to the jury that it would not present frivolous evidence. (R. 813, 814, 816) Johnson then urged each juror to "accept your responsibility" and be proud of their service in the case. (R. 816)

Miller has failed to present any evidence to demonstrate that trial counsel's strategy was unreasonable. The fact that Johnson agreed with many of the alleged facts as provided during the prosecution's opening statement was consistent with this strategy. See Saunders v. State, CR-05-0281, 2007 WL 4533441 at *33 (Ala. Crim. App. December 21, 2007)("When counsel fails to oppose the prosecution's case at specific points or concedes certain elements of a case to focus on others, he has made a tactical decision."). As the Court of Criminal Appeals noted in rejecting Miller's claim that his trial counsel was ineffective during his opening statement, "Johnson's decision was part of his strategy to spare Miller's life." Miller v. State, 913 So. 2d 1148, 1161 (Ala. Crim. App.

2004); see also Boyd, 746 So. 2d at 375 ("Strategic choices made after a thorough investigation of relevant law and facts are virtually unchallengeable."). Trial counsel Johnson's opening statement was the product of a reasonable, strategic decision to win favor with the jury by not presenting frivolous arguments in order to spare Miller's life. Miller has not presented any evidence to demonstrate Johnson's strategy was unreasonable. Therefore, this claim is denied.

This claim is also denied because Miller has failed to meet his burden of proof of demonstrating that he was prejudiced by his trial counsel's opening statement. See Strickland, 466 U.S. at 695; Ala. R. Crim. P. 32.7(d). Miller has presented no evidence concerning the impact of Johnson's statements on the jury, nor has Miller demonstrated a reasonable probability that the outcome of the guilt phase would have been had Johnson not made these statements. In general, statements of counsel "are usually valued by the jury at their true worth and are not expected to become factors in the formation of the verdict." Minor v. State, 914 So. 2d 372, 417 (Ala. Crim. App. 2004). Miller has offered nothing more in support of his claim

than the bare, conclusory allegation that Johnson's opening statement was improper and that it prejudiced the jury, without proving specific facts that demonstrate prejudice. Accordingly, Miller has not met his burden of demonstrating prejudice under Strickland and therefore, this claim is denied.

3. Miller's Claim That His Trial Counsel Violated His Constitutional Rights By Failing To Offer Any Defense During The Guilt Phase.

In paragraphs 173-85 of his amended petition, Miller claims that his trial counsel were ineffective for failing to present a defense theory or evidence during the guilt phase of trial. (Pet. at 51) Miller argues that trial counsel could have presented the testimony of Dr. Scott or arguments based on Dr. Scott's findings that Miller could not form the intent to commit capital murder based on his delusional disorder or that Miller should only be convicted of manslaughter.

This Court denies Miller's claim because he has failed to meet his burden of proof of demonstrating that his trial counsels' performance was deficient under Strickland, 466 U.S. at 687. Ala. R. Crim. P. 32.7(d). Trial counsel Johnson had reasonable, strategic reasons for not

presenting evidence during the guilt phase of trial. Johnson testified that his trial strategy focused on presenting the best evidence and testimony that would save Miller's life. (R2. 80) Based on the facts and circumstances of his case, Johnson determined that his best opportunity and most effective method of presenting such testimony would be during the penalty phase. (R2. 80, Rule 32 R. 219) Part of this strategy also involved gaining credibility and favor with the jury but not presenting frivolous arguments during the guilt phase such as challenging the blood spatter expert's testimony. (Rule 32 R. 219-26)

Johnson testified that the prosecution's evidence was strong, that he could not contest the fact that the shootings were part of a single act, and that he made a strategic decision to not put on frivolous evidence during the guilt phase. (R. 14, Rule 32 R. 99, 219) Johnson felt that any potential testimony about Miller's mental health during the guilt phase would be less impactful or even frivolous. (R2. 80) However, Johnson stated that he wanted Miller to testify on his own behalf during the guilt phase and talked with Miller about this possibility, but Miller

refused. (Rule 32 R. 220) Finally, Johnson acknowledged that it was not uncommon to not present evidence during the guilt phase and to focus solely on the penalty phase. (Rule 32 R. 228)

Johnson's conclusions on the strength of the prosecution's case in the guilt phase are well supported by the evidence. As the Court of Criminal Appeals recognized on direct appeal, "[g]iven the overwhelming evidence of Miller's guilt - inclusing eyewitness testimony identifying Miller as the shooter - counsel had little choice but to acknowledge Miller's guilt." Miller, 913 So. 2d 1162. Johnson and co-counsel Blackwood faced the daunting task during the guilt phase of defending Miller against strong evidence which included two separate eyewitnesses to the shootings at both Ferguson Enterprises and Post Airgas.

Despite this evidence, this is not a case in which trial counsel failed to investigate potential guilt phase testimony. As noted above, Johnson initially hired Dr. Scott to investigate Miller's mental health with the intention of presenting evidence during the guilt phase that Miller could not appreciate the wrongfulness of his actions. (Rule 32 R. 48) However, after Dr. Scott

determined that Miller did not qualify for the insanity defense under Alabama law, Johnson withdrew the not guilty by reason of mental defect plea. (Rule 32 R. 92)

As the Court of Criminal Appeals noted, this decision was made "after a thorough investigation of the relevant law and facts of Miller's case" and Johnson's focus on the penalty phase "was part of his strategy to spare Miller's life." Miller, 913 So. 2d at 1161 (holding that "[u]nder the circumstances of this case, defense counsel made a well-reasoned decision to focus his efforts on that part of the trial that he believed offered the greatest chance of success. We see no reason to second-guess defense counsel's decisions regarding this strategy.") Miller has failed to offer any proof that this trial strategy was not the product of a reasonably competent attorney.

Contrary to Miller's claims, Johnson also had strategic reasons for not presenting Dr. Scott's testimony during the guilt phase in an attempt to argue that Miller did not have intent to commit capital murder. (Rule 32 R. 222) First, Johnson testified that in his opinion, Dr. Scott's testimony would have had more of an impact during the penalty phase based on the information available for Dr.

Scott to present. (Rule 32 R. 285) Johnson stated that much of Dr. Scott's testimony during the penalty phase was based on hearsay and therefore, Dr. Scott would have been more limited in providing testimony in the guilt phase. (Rule 32 R. 284) Johnson also determined that Dr. Scott would have been subject to a more stringent cross-examination during the guilt phase. (Rule 32 R. 284) Therefore, as Johnson acknowledged, he could not have simply introduced the beneficial, limited parts of Dr. Scott's report; instead the entire report could have been subject to cross-examination. (Rule 32 R. 100)

Dr. Scott's own report contained opinions which could have rebutted any argument that Miller did not have the intent to commit murder as a result of a delusional disorder. Despite the fact that Dr. Scott opined that Miller suffered from a delusional disorder, Dr. Scott stated that:

> "because Mr. Miller followed a second victim, shot the first victim again before he left Ferguson Enterprises and because he went to a second work site, it is my opinion that the evidence indicates he appreciate the nature and quality of his actions towards each victim."

(Petitioner's Ex. 29-0022) Miller's own expert's opinion was consistent with the very same facts that the

prosecution presented during trial to argue that Miller intended to commit murder. (R. 1254-61, 1264-75) Based on the facts of this case, trial counsels' decision to not present evidence during the guilt phase and instead focus on the penalty phase was reasonable and Miller has failed to present any evidence demonstrating how this strategy was deficient. Therefore, this claim is denied.

This claim is also denied because Miller has failed to meet his burden of proof of demonstrating that he was prejudiced by his trial counsels' decision not to present evidence during the guilt phase. See Strickland, 466 U.S. at 695; Ala. R. Crim. P. 32.7(d). Miller's expert, Dr. Scott, testified during the penalty phase of trial that Miller was not unable to appreciate the wrongfulness of his actions and therefore did not meet the legal definition of insanity under Alabama law. (R. 1384) The only other possible strategy that Miller has alleged that trial counsel could have pursued during the guilt phase centered on arguing that Miller did not have the intent to commit capital murder.

However, such an argument would have run contrary to the overwhelming evidence indicating Miller's intent to

commit murder. Johnny Cobb, an employee at Ferguson Enterprises, heard shouting, witnessed Miller walk out of the front door of the office with a pistol towards his truck, and drive away. Miller, 913 So. 2d at 1154. Cobb then entered the building and saw Christopher Yancy and Lee Holdbrooks on the floor. Id. Yancy was shot three times and Holdbrooks was shot six times with the fatal shot being fired as Holdbrooks looked up at Miller. Id. at 1156.

Andy Adderhold witnessed Miller arrive at Post AirGas, walk into the office, specifically call out to Terry Jarvis, and then repeatedly shoot Jarvis. Id. at 1155. Miller then ordered Adderhold out of the office, but Adderhold still heard a final gunshot as he left the building. Id. Jarvis was shot five times with the fatal shot to Jarvis' heart occurring when Miller was standing directly over him. Id. at 1156.

Miller cannot demonstrate a reasonable probability that had trial counsel presented evidence in the guilt phase to challenge Miller's intent that the outcome of his trial would have been different in the face of these brutal facts. Miller specifically sought out two victims, shot them multiple times, proceeded to another location,

specifically sought out another victim, and shot him multiple times. Miller's own expert indicated that such evidence indicates that Miller could "appreciate the nature and quality of his actions towards each victim." (Petitioner's Ex. 29-0022) Even if Miller could demonstrate that his trial counsel were deficient during the guilt phase, which he cannot, he has failed to demonstrate how he was prejudiced under Strickland by his trial counsels' strategy. Accordingly, this claim is denied.

4. Miller's Claim That Trial Counsel Failed to Object To The Admission Of Irrelevant And Prejudicial Testimony And Photographs By The State.

In paragraphs 186-191 of his amended petition, Miller claims that trial counsel were ineffective for failing to object to the prosecution's introduction of irrelevant and inflammatory evidence during the guilt phase of trial. Miller claims that the testimony of the prosecution's forensic scientists, Dr. Angello Della Manna, allowed the state to introduce gruesome testimony and photographs of the victims and crime scene. (Pet. at 55) Miller also alleges that trial counsel failed to object to the testimony of Dr. Stephen Pustilnik pertaining to the gunshot wounds of the victims.

However, this Court finds that Miller failed to present any evidence whatsoever during the evidentiary hearing in pursuit of this claim. In fact, Miller failed to ask trial counsel a single question regarding why trial counsel did not object to certain testimony or allegedly prejudicial photographs. Nor did Miller offer any evidence that would establish that the testimony and photographs of the victims and crime scene were actually irrelevant and inflammatory in this case. Therefore, this Court denies this claim because Miller has abandoned the claim. See Brooks, 929 So. 2d at 498 (holding that a Rule 32 petitioner's failing to ask counsel "any questions concerning her reasons for not pursuing any of the claims" in the Rule 32 petition constitutes an abandonment of those issues). See also Chandler, 218 F.3d 1305, 1314 n. 15 ("An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption [of effective representation]"); Payne, 791 So. 2d at 399 ("Because it appears that Payne did not present evidence at the evidentiary hearing with regard to [Payne's claims], we conclude that he has abandoned these claims and we will not review them.")

Additionally, this claim is denied because Miller's allegation is completely without merit; Miller's trial counsel was not deficient for failing to object to testimony and photographs relating to the crime scene and the gunshot wounds of the victims, nor was Miller prejudiced by his trial counsels' failure to object. The long standing rule in Alabama states that:

> "photographs which show external wounds in the body of a deceased victim, even though they are cumulative and based on undisputed matters, are admissible. The fact that they are gruesome is not grounds to exclude them so long as they shed light on the issues being tried. The fact that a photograph is gruesome and ghastly is no reason to exclude it from the evidence, so long as the photograph has some relevancy to the proceedings, even if the photograph may tend to inflame the jury."

Sneed v. State, CR-05-2033, 2007 WL 4463873 at *22 (Ala. Crim. App. December 21, 2007)(internal citations omitted). The testimony and photographs of both the crime scene as well as the gunshot wounds of the victims were relevant and necessary to prove that Miller intended to kill each victim in this case. (R. 1271-75) Therefore, under clearly established law, even if trial counsel had objected, this evidence would have still been admissible. Therefore, Miller's trial counsel could not be ineffective for failing

to make such an objection. See McNabb v. State, 991 So. 2d 313, 327 (Ala. Crim. App. 2007)("[C]ounsel could not be ineffective for failing to raise a baseless objection.") Accordingly, this claim should be denied.

5. Miller's Claim That Trial Counsel Failed To Effectively Cross-Examine Crucial Prosecution Witnesses.

In paragraphs 192-208 of his amended petition, Miller claims that his trial counsel were ineffective for failing to effectively cross-examine crucial prosecution witnesses.

This Court denies Miller's claim because he has failed to present any evidence whatsoever during the evidentiary hearing in pursuit of this claim. In fact, Miller failed to ask trial counsel a single question regarding trial counsels' strategy in cross-examining the prosecution's witnesses. Miller did not identify any specific questions that trial counsel could have asked each witness or elicited during cross-examination. Nor did Miller offer any evidence that would establish how he was prejudiced by his trial counsels' cross-examination. Therefore, this Court finds that Miller has abandoned this claim. See Brooks, 929 So. 2d at 498 (holding that a Rule 32 petitioner's failing to ask counsel "any questions

concerning her reasons for not pursuing any of the claims" in the Rule 32 petition constitutes an abandonment of those issues). See also Chandler, 218 F.3d 1305, 1314 n. 15 ("An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption [of effective representation]"); Payne, 791 So. 2d at 399 ("Because it appears that Payne did not present evidence at the evidentiary hearing with regard to [Payne's claims], we conclude that he has abandoned these claims and we will not review them.") Miller has failed to meet his burden of proof of establishing that his trial counsel was ineffective and therefore, this claim is denied.

6. Miller's Claim That Trial Counsel's Closing Argument In The Guilt Phase Was Deficient And Prejudicial.

In paragraphs 209-13 of his amended petition, Miller claims that his trial counsel was ineffective during the guilt phase closing arguments. Miller claims that Johnson conceded guilt and made no attempt to argue that Miller did not have the intent to commit murder. (Pet. at 61) Miller also claims that his Johnson was ineffective for stating that he was not "proud" to represent Miller. (Pet. at 62)

This Court denies Miller's claim because he has failed to meet his burden of proof of demonstrating that his trial counsels' performance was deficient under Strickland, 466 U.S. at 687. Ala. R. Crim. P. 32.7(d). Johnson's closing argument was reasonable based both on the tactical decision to focus on the penalty phase of trial and his overall strategy of not presenting frivolous arguments in order to win credibility with the jury. (R. 1261-64) As noted above, Johnson continually testified that he strategically chose to focus on the penalty phase of Miller's trial in order to save Miller's life. (R2. 80, Rule 32 R. 219) In an attempt to bolster his chances of success during the penalty phase, Johnson made a tactical decision to emphasize to the jury that he would not be presenting frivolous evidence or arguments during the guilt phase. (Rule 32. R. 143, 219)

Similar to his comments during opening statements, Johnson echoed to the jury during closing arguments that he was not going to present a frivolous defense such as arguing a second gunman existed or challenging the fact that the prosecution could not match the bullets taken from the victims to Miller's gun. (R. 1261-62) Johnson reminded the jury of the State's burden and implored the jury to

listen to the judge's instructions on the law and render a verdict based on the facts and consistent with their oath. (R. 1263) Miller has failed to present any evidence which would establish that Miller's continual effort during closing arguments to gain credibility with the jury in order to make an effective penalty phase argument was unreasonable.

Johnson's decision to not argue that Miller did not have intent to commit capital murder during closing arguments was consistent with his overall trial strategy of focusing on the penalty phase of trial. (Rule 32 R. 219) Moreover, Johnson's comments about his representation of Miller were consistent with this strategy as well. Johnson told the jury that he was proud of his representation of Miller, but in an effort to win favor with the jury, also stated he was still not proud of what happened during the shootings:

> "And I at least am proud at this point that I have participated in this. It does not remove to any degree the shame of what happened. It does not make me proud that I'm representing someone who the evidence is fairly convincing, I must concede to you, did what he did."

(R. 1263-64) During the evidentiary hearing, Johnson explained that this statement could not be viewed in

isolation, but as part of a larger goal of not alienating the jury during the guilt phase to attempt to win favor with the jury. (Rule 32 R. 142-43)

When viewed in the context of Johnson's entire trial strategy, Johnson's closing argument was a reasonable attempt to gain credibility with the jury during the guilt phase in order to attempt to get a favorable result in the penalty phase - the focus of Johnson's strategy. Based on this approach, Miller has failed to demonstrate that trial counsel's decision was unreasonable or that his performance during closing arguments was deficient under Strickland. Therefore, this claim is denied.

This claim is also denied because Miller has failed to meet his burden of proof of demonstrating that he was prejudiced by his trial counsel's closing argument. See Strickland, 466 U.S. at 695; Ala. R. Crim. P. 32.7(d). Miller has presented no evidence concerning the impact of Johnson's statements on the jury, nor has Miller demonstrated a reasonable probability that the outcome of the guilt phase of his trial would have been different had Johnson not conducting his closing argument in this manner. In general, statements of counsel "are usually valued by

the jury at their true worth and are not expected to become factors in the formation of the verdict." Minor, 914 So. 2d at 417. Miller offered nothing more in support of his claim of ineffectiveness than the bare, conclusory allegation that Johnson's closing argument was improper and that it prejudiced the jury, without proving specific facts that demonstrate prejudice. Accordingly, Miller has not met his burden of demonstrating prejudice under Strickland and therefore, this claim is denied.

7. Miller's Claim That Trial Counsel Erroneously Failed To Object To Misleading Portions of the State's Closing Argument.

In paragraphs 214-16 of his amended petition, Miller claims that his trial counsel were ineffective for failing to object to part of the prosecution's closing arguments. Miller claims that the prosecution made arguments based on facts not in evidence that Holdbrooks and Yancy were facing Miller when he shot them.

This Court finds that Miller failed to present any evidence whatsoever during the evidentiary hearing in pursuit of this claim. Therefore, this Court denies all relief on this claim. In fact, Miller failed to ask trial counsel a single question regarding why Johnson did not

object to the prosecution's closing argument. During the evidentiary hearing, Miller did not identify any specific statement made by the prosecutor in closing arguments to which Miller should have objected. Miller did not ask what trial counsel's strategy was during the prosecution's closing arguments. Nor did Miller offer any evidence that would establish how he was prejudiced by his trial counsels' decision not to object. Therefore, this Court finds that Miller has abandoned this claim. See Brooks, 929 So. 2d at 498 (holding that a Rule 32 petitioner's failing to ask counsel "any questions concerning her reasons for not pursuing any of the claims" in the Rule 32 petition constitutes an abandonment of those issues). See also Chandler, 218 F.3d at 1314 n. 15 ("An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption [of effective representation]"); Payne, 791 So. 2d at 399 ("Because it appears that Payne did not present evidence at the evidentiary hearing with regard to [Payne's claims], we conclude that he has abandoned these claims and we will not review them.") Because Miller has failed to meet his burden of proof of

demonstrating that trial counsel was ineffective, this claim is denied.

8. Miller's Claim That Trial Counsel Failed To Request Jury Instructions Necessary To Protect His Rights.

In paragraphs 217-22 of his amended petition, Miller claims that his trial counsel were ineffective for failing to ensure that the jury was properly instructed.

This Court finds that Miller failed to present any evidence whatsoever during the evidentiary hearing in pursuit of this claim. Miller failed to ask trial counsel a single question regarding why Johnson did or did not request certain instructions. During the evidentiary hearing, Miller did not identify any specific instructions to which Johnson should have requested. Miller did not ask what trial counsel's strategy was during the jury instruction process. Nor did Miller offer any evidence that would establish how he was prejudiced by his trial counsels' strategy in proposing jury instructions. Therefore, this Court should find that Miller has abandoned this claim. See Brooks, 929 So. 2d at 498 (holding that a Rule 32 petitioner's failing to ask counsel "any questions concerning her reasons for not pursuing any of the claims"

in the Rule 32 petition constitutes an abandonment of those issues). See also Chandler, 218 F.3d at 1314 n. 15 ("An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption [of effective representation]"); Payne, 791 So. 2d at 399 ("Because it appears that Payne did not present evidence at the evidentiary hearing with regard to [Payne's claims], we conclude that he has abandoned these claims and we will not review them.") Therefore, this claim is denied.

D. Miller's Claim That His Trial Counsels' Performance During The Penalty Phase Violated His Constitutional Rights.

In paragraphs 223-76 of his amended petition, Miller raises several instances in which he alleges that his trial counsel were ineffective during the penalty phase of trial. Each claim of ineffective assistance of trial counsel during the guilt phase is addressed individually below:

1. Miller's Claim That Trial Counsels' Penalty Phase Opening Statement Was Deficient And Prejudicial.

In paragraphs 228-37 of his amended petition, Miller claims that his trial counsel failed to present a coherent mitigation case, failed to humanize Miller, and failed to present a proper context for Dr. Scott's testimony in his

opening statement. (Pet. at 67) Miller claims that Johnson suggested that Miller deserved to be executed and that Johnson described Miller as being "atrocious" and "vial" [sic]. (Pet. at 69)

This Court denies Miller's claim because he has failed to meet his burden of proof of demonstrating that his trial counsels' performance was deficient under Strickland, 466 U.S. at 687. Ala. R. Crim. P. 32.7(d). A review of the record indicates that Johnson had a specific message to convey to the jury during opening statements of the penalty phase. (R. 1324-34) Johnson explained that his strategy opening statements was to convey that no matter what Miller had done, "whether [the jury] thought he was atrocious or not" and "whatever their feelings was about Mr. Miller" that Miller did not deserve the death penalty. (Rule 32 R. 151, 156)

To emphasize this message, Johnson argued that the jury should not recommend a sentence of death because such a sentence would not bring about justice and attempted to lessen the impact of the prosecution's sole aggravating circumstances by showing that all murders were heinous and atrocious. Johnson implored the jury that the death

penalty was "imperfect justice" and stated that if the jury recommended taking Miller's life, the result would also be "imperfect justice." (R. 1324-25) Instead, Johnson stated that "I am asking you to recommend that the state not take his life." (R. 1335) In support of his plea, Johnson urged the jury to consider the testimony of Dr. Scott, who would attempt to explain "why did all of this happen and what meaning can we make of any of this?" (R. 1326-27)

Johnson then gave reasons why the jury should recommend a sentence of life imprisonment by stating that Dr. Scott would explain that Miller was under "significant emotional and psychological problems" at the time of the shootings. (R. 1327) Johnson also told the jury that Dr. Scott's testimony would paint the picture of Miller as a "tortured soul" who believed and perceived events that were not real, such as the work-place rumors and teasing, and that because of these beliefs, Miller committed these acts. (R. 1329-30)

Additionally, Johnson informed the jury that he accepted the prosecution's challenge of showing that the murder was not heinous, atrocious, and cruel by stating that "I've never seen a murder that wasn't." (R. 1327) Johnson also reminded the jury that a capital murder which

is cruel, heinous, and atrocious "is something that goes above and beyond those facts which simply amount to capital murder." (R. 1328)

Miller has failed to present any evidence that establishes that trial counsel's strategy and the implementation of this strategy during opening penalty phase statements was deficient. The Court of Criminal Appeals approvingly noted Johnson's strategy of attempting "to portray Miller as a 'tortured soul' whose delusions drove him to commit a series of horrific acts." Miller, 913 So. 2d at 1162-63.

The record confirms that Court's ultimate conclusion that "counsel's argument reveals it to be an impassioned plea that the jury spare Miller's life." Id. at 1163 (rejecting claim that Johnson was ineffective during penalty phase opening statements). Johnson's statement that "there is only one way to get real justice out of this and that would be the taking of Alan Miller's life would restore those other three" was a reasonable attempt to show the jury that sentencing Miller to death would still result in imperfect justice. (R. 1324) Likewise, Johnson reasonably attempted to de-emphasize and lessen the impact

of overwhelming evidence towards the heinousness and atrociousness of the shootings by urging that jury that a murder is always heinous and atrocious. (R. 1327, Rule 32 R. 149)

Moreover, contrary to his claim, Johnson did not call Miller "atrocious" and "vial" [sic]. Instead, Johnson simply exhorted the jury against the death penalty in Miller's case because "no matter how atrocious, no matter how vial a person is, they don't deserve to die, they deserve to live." (R. 1332) This comment did not imply that Johnson himself believe Miller to be atrocious; as Johnson explained, this was a general comment against the death penalty direct to the jury to show that "Alan Miller didn't deserve to die whether they thought he was atrocious or not." (Rule 32 R. 151)

Finally, Johnson effectively previewed for the jury during his opening statement Dr. Scott's anticipated testimony. (R. 1327-29) This preview was consistent with the focus of Dr. Scott's subsequent testimony and the main piece of Johnson's penalty phase strategy: that Miller had a personality disorder and suffered from delusions which contributed to him committing the murders and that these

facts constituted mitigating circumstances. (R. 1365-91) Miller has failed to meet his burden of establishing that no reasonably competent attorney would have pursued the course of action Johnson undertook during the penalty phase opening statements. Johnson had strategic reasons for presenting his statement in this manner and Miller failed to establish this performance was deficient. Therefore, this claim is denied.

This claim is also denied because Miller has failed to meet his burden of proof of demonstrating that he was prejudiced by his trial counsel's opening statement during the penalty phase. See Strickland, 466 U.S. at 695; Ala. R. Crim. P. 32.7(d). Miller has presented no evidence concerning the impact of Johnson's statement on the jury, nor has Miller demonstrated a reasonable probability that the outcome of the penalty phase would have been different had Johnson not made these statements. Miller has not proven that the jury did not consider Dr. Scott's testimony as strongly as the result of Johnson's statement or it affected the jury's consideration of mitigating and aggravating circumstances. In fact, the record indicates that Johnson's strategy was successful and did have some,

positive impact on the jury during the penalty phase based on the fact that two jurors voted to recommend a life sentence. (C. 74)

In general, statements of counsel would not have an ultimate outcome of a trial for they "are usually valued by the jury at their true worth and are not expected to become factors in the formation of the verdict." Minor, 914 So. 2d at 417. Miller has offered nothing more in support of his claim of ineffectiveness than the bare, conclusory allegation that Johnson's opening statement was improper and that it prejudiced the jury, without proving specific facts that demonstrate prejudice. Accordingly, Miller has not met his burden of demonstrating prejudice under Strickland and therefore, this claim is denied.

2. Miller's Claim That Trial Counsel Failed To Adequately Present Readily Available Mitigating Evidence To The Jury.

In paragraphs 238-64 of his amended petition, Miller claims that his trial counsel were ineffective in presenting a mitigation case on Miller's behalf. Miller's claim contained numerous reasons in which he alleges trial counsels' mitigation presentation was ineffective. First, Miller claims that Dr. Scott's testimony was insufficient

to present a mitigation case because Dr. Scott had not been retained as a mitigation expert. (Pet. at 70) Miller also claims that "the jury never heard about the emotional and physical terror that Mr. Miller's father, Ivan, had inflicted upon Mr. Miller and his family." (Pet at 71) Miller alleges that the jury never heard about his troubled childhood including the extent of the family's poverty, the family's frequent relocations, and the unlawful behavior and drug abuse that occurred in the Miller home. (Pet. at 73) Miller also claims that his trial counsel were ineffective for not presenting mitigation evidence through the following family members: his mother, Barbara, his siblings, Richard, Cheryl, and Jeff, his niece, Alicia, his nephew, Jake, and his cousin, Brian. (Pet. at 75) Finally, Miller claims that the jury never heard positive information about his life such as the fact that he worked to provide money for his family and his good employment history. (Pet. at 75-76)

This Court denies Miller's claim because he has failed to meet his burden of proof of establishing that trial counsels' performance was deficient under Strickland, 466 U.S. at 687. Ala. R. Crim. P. 32.7(d). The basic thrust of

Miller's claim is that his trial counsel should have done something more - i.e. that more mitigating evidence concerning his mental history, his personal background, and family background should have been presented during the penalty phase. When a claim is raised that trial counsel should have done something more, a court must first look at what trial counsel did. Chandler, 218 F.3d at 1320 ("Although Petitioner's claim is that his trial counsel should have done something more, we first look at what the lawyer did in fact."). Moreover, "the mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel." Id. at 1316 n. 20.

Johnson testified that he made a strategic decision to focus on the penalty phase of Miller's trial and that his specific theory of defense was that Miller suffered from a diminished capacity. (R2. 17, Rule 32 R. 219) Accordingly, Johnson presented the testimony of Dr. Scott for this purpose in an effort to establish the existence of two statutory mitigating circumstances: that the capital offense was committed while the defendant was under the

influence of extreme mental or emotional disturbance under Ala. Code § 13A-5-51(2) and that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired under Ala. Code § 13A-5-51(6). (R. 1343-91, Rule 32 R. 186-87) Johnson had originally retained Dr. Scott to evaluate Miller in regards to an insanity plea; however, after Dr. Scott issued his report and the insanity plea was dropped, Johnson discussed with Dr. Scott the possibility of presenting the mental health evidence from Dr. Scott's evaluation in support of a mitigation case. (Rule 32 R. 181, 190, 253)

At trial, Dr. Scott provided testimony relating to Miller's psychological background as well as Miller's version of the events on the day of the shooting in support of a diminished capacity strategy. Dr. Scott testified that Miller reported that he believed people were watching him and teasing him at work and that these feelings weighed on his mind. (R. 1365-66, 1369) Dr. Scott stated that Miller said the pressure of these thoughts kept building up in his mind and that the "straw that broke the camel's back" occurred when he arrived at work at Ferguson

Enterprises on August 5, 1999. (R. 1373-75) Dr. Scott also testified that Miller reported experiencing "tunnel vision" and that Miller had difficulty recalling the events of the crime. (R. 1375, 1378) Based on this evidence, Dr. Scott opined that Miller did have a mental illness at the time of the shootings, specifically a delusional disorder, and that his ability to appreciate his conduct was substantially impaired. (R. 1389-91)

Although the presentation of testimony supporting a diminished capacity theory was Johnson's main strategy, contrary to Miller's claims, Johnson also presented an array of mitigating evidence concerning Miller's background, family history, and positive information about his life though the testimony of Dr. Scott. Johnson did not hire Dr. Scott with the express purpose of investigating Miller's background, and in fact, Johnson and Dr. Scott agreed that he was not retained in the capacity of a mitigation expert. (Rule 32 R. 189, 311) However, Dr. Scott did state that it was important for him to learn as much as he could about Miller's social background, educational background, and personal history during his evaluation. (R. 1348) Johnson testified Dr. Scott did a

thorough job of investigating relevant family history and background information and could perform the role of presenting this information he discovered to the jury. (Rule 32 R. 222, 254)

Contrary to Miller's claims, evidence concerning the physical and emotional abuse inflicted on him personally by Miller's father, Ivan, and on his family was presented through the testimony of Dr. Scott. Dr. Scott testified that Ivan was "verbally abusive" to Miller, that Ivan told Miller at a young age he would not amount to anything, and that Ivan called him a "God damn son of a bitch." (R. 1350) Dr. Scott also testified that Ivan was "physically abusive" to Miller and frequently hit Miller which left bruises on him. (R. 1350) Dr. Scott told the jury about a specific occurrence of Ivan's abuse when Ivan threatened to harm Miller with a large butcher knife. (R. 1351) Dr. Scott also noted that Miller witnessed Ivan's verbal and physical abuse to his mother, in which Ivan called her a "whore" and frequently hit her "very hard." (R. 1351)

Contrary to Miller's claim, evidence detailing Miller's impoverished childhood and unstable home environment was presented through Dr. Scott's testimony. Dr. Scott stated

that Miller had "an unusual early childhood" because his family frequently moved between Illinois, Alabama, and Texas as many as seven to 10 times. (R. 1349) Dr. Scott testified that Ivan Miller often quit or lost his job and that the family lived "on the edge of poverty a lot." (R. 1349) Dr. Scott also informed the jury that drug use was present during Miller's childhood, noting that Ivan Miller "abused marijuana quite heavily" and injected drugs intravenously in Miller's presence. (R. 1350) Dr. Scott also provided details of Ivan Miller's eccentric behavior, testifying that Ivan thought he had the power to heal and that his father laid hands on Miller's brother and walked around the house spraying "holy water." (R. 1350-51) Additionally, Dr. Scott presented evidence of the family psychiatric history. (R. 1362) Dr. Scott noted Ivan Miller's erratic behavior and also testified that Miller's grandfather had been institutionalized and that his brother was considered slow. (R. 1362-63)

Finally, contrary to Miller's claims, Dr. Scott provided positive evidence of Miller's character. Dr. Scott noted that that Miller had a great, loving relationship with his mother, Barbara. (R. 1352) Dr. Scott

told the jury that Miller quit school when he was in the eleventh grade so that he could work and provide money for his family. (R. 1349-50) Dr. Scott noted that Miller did not have a history of aggressive behavior and that Miller eventually graduated from high school. (R. 1352-53) Dr. Scott also testified that Miller did not have a history of any serious drug or alcohol abuse. (R. 1356) Dr. Scott also provided the jury with details of Miller's employment history, testifying that Miller had several jobs, usually left a job for a job that paid more money, and kept to himself during work. (R. 1363) In total, the scope of Dr. Scott's testimony was broad and provided many details of events throughout his lifetime and extensively covered various areas of his personal history.

Based on the record of trial and the evidentiary hearing, this Court finds that trial counsel made a strategic decision to concentrate on presenting evidence during the penalty phase on Miller's diminished mental capacity that would support a finding of the existence of two statutory mitigating circumstances. Trial counsel also presented a wealth of evidence concerning Miller's background and family history. Trial counsel's strategy

was successful in that two jurors recommended a sentence of life imprisonment and the trial court found the existence of three statutory mitigating circumstances. Miller, 913 So. 2d at 1169.

Simply because Miller alleges that more mitigating evidence could have been presented does not demonstrate that his trial counsel was ineffective. Trial counsels' decision was reasonable and strategic, and this Court will not "second-guess" it. See, e.g., Crawford v. Head, 311 F.3d 1288, 1312 (11th Cir. 2002)("This court agrees that testimony from a mental health expert ... would have been admissible and might be considered to be mitigating. However, trial counsel chose to pursue a strategy of focusing the jury's attention on the impact of a death sentence on petitioner's family. This court will not second guess trial counsel's deliberate choice."); Boyd v. State, 746 So. 2d 364, 398 (Ala. Crim. App. 1999)("Trial Counsel stated that the defense strategy was to humanize Boyd for the jury ... [W]e do not find counsel's efforts to be ineffective.").

This Court also finds that trial counsel also had tactical reasons for not presenting evidence or witnesses

which Miller now alleges should have been presented during the penalty phase. See Payne v. State, 791 so. 2d 383, 404 (Ala. Crim. App. 1999) ("When a decision to not put on certain mitigating evidence is based on a 'strategic choice,' courts have always found no ineffective performance."). Miller claims that a host of family members, particularly his mother, Barbara should have been presented as witness during the penalty phase of trial.

However, both trial counsels testified during the evidentiary hearing that they had specific, strategic reasons for not presenting Barbara Miller as a witness. Johnson testified that he talked with Barbara Miller in preparation for the penalty phase, considered calling her as a witness, and discussed this possibility with co-counsel Ronnie Blackwood. (R. 158, 229) Johnson explained that his reason for not calling Barbara as a witness was that he felt she would not be effective as a witness:

> "I ... spent enough time with Alan's mother to be able to draw some conclusions ... about how effective she might be in that capacity.... I was concerned that with Alan's mother['s] demeanor that it might diminish that natural sympathy for a mother because I found her ... to be somewhat emotionally detached from the circumstances we were in."

(Rule 32 R. 177-78) (see also Rule 32 R. 230-31)

Blackwood confirmed that trial counsel discussed the possibility of putting Barbara Miller on the stand. (Rule 32 R. 863) Blackwood testified he spoke with Barbara Miller about testifying and that he talked with her about what she might testify to in regards to saving Miller's life if called. (Rule 32 R. 864) During this conversation, Blackwood testified that Barbara Miller was "very matter of fact" and also uttered a racially derogatory word. (Rule 32 R. 864-65) Blackwood stated that Barbara Miller's demeanor and her use of this language contributed to the strategic decision to not call her as a witness. (Rule 32 R. 865)

Johnson provided another reason for not calling Barbara Miller as a witness stating that "I didn't know that she had any background information that might be particularly important that wasn't already presented by Dr. Scott." (Rule 32 R. 178) Furthermore, Johnson testified that he decided during the penalty phase that there were not any other members of Miller's family whose testimony could have made an impact during the penalty phase. (Rule 32 R. 245) Moreover, Johnson could not have even been aware of two of the family witnesses Miller now claims should have been called as witnesses during the penalty phase. Miller's

nephew, Jake Connell, and his niece, Alicia Sanford, both testified during the evidentiary hearing that neither of them even attended Miller's trial. (Rule 32 R. 498, 585) Trial counsel had specific, strategic reasons for calling and not calling the witnesses they did during the penalty phase and Miller has failed to establish that trial counsels' choices were deficient. Miller has not proved that no reasonably competent attorney would have proceeded during the penalty phase in the manner in which Miller's trial counsel did.

Finally, Miller has failed to demonstrate that his trial counsel were deficient for not retaining and presenting the testimony of a mitigation expert. As noted above, Dr. Scott adequately presented an abundant amount of mitigating evidence. Furthermore, Miller has failed to present any evidence that establishes a reasonably competent attorney practicing at the time of Miller's trial would have retained and presented a mitigation expert. With over twenty-five years of experience litigating criminal cases and participating in several capital murder trials before Miller's, Johnson testified that he had never retained a mitigation expert. (Rule 32 R. 210, 254)

Blackwood also testified that in his experience as a criminal defense attorney, he had never hired a mitigation expert. (Rule 32 R. 868) Accordingly, Miller has failed to establish that his trial counsel were deficient in this regard. Furthermore, Miller has failed to meet his burden of proof of demonstrating that his trial counsels' penalty phase strategy and performance were unreasonable and deficient. Therefore, this claim is denied.

This claim is also denied because Miller has failed to meet his burden of proof of demonstrating that he was prejudiced by his trial counsels' penalty phase performance. See Strickland, 466 U.S. at 695; Ala. R. Crim. P. 32.7(d). Even if Miller had demonstrated that his trial counsel were deficient for not presenting sufficient mitigation evidence during the penalty phase, Miller has failed to establish a reasonable probability that the outcome of his proceeding would have been different had such information been presented.

Miller has failed to establish that he was prejudiced by trial counsel's decision to not retain and present the testimony of a mitigation expert. As noted above, Dr. Scott presented thorough testimony during the penalty phase

detailing Miller's background and family history and also focused much of his testimony on presenting evidence of Miller's mental health problems. (R. 1343-91) Similar to Dr. Scott, Dr. Catherine Boyer testified during the evidentiary hearing in regards to what type of investigation a mitigation expert would conduct. (Rule 32 R. 592-93)

Dr. Boyer also stated that, like Dr. Scott, she met Miller over a period of three occasions. (Rule 32 R. 598) However, Dr. Boyer's testimony during the evidentiary hearing covered essentially the same topics and areas which Dr. Scott presented during the penalty phase. Dr. Boyer testified concerning Miller's family history of mental illness, that his family lived in poverty, that Miller had a good employment history, that Ivan was physically abusive, and that Miller had a good relationship with his mother and siblings. (Rule 32 R. 643-74) Additional evidence concerning Miller's background and family history provided by Dr. Boyer was simply cumulative of the testimony provided by Dr. Scott during the penalty phase. However, "unpresented cumulative testimony does not establish that counsel was ineffective." McNabb v. State,

991 So. 2d 313, 322 (Ala. Crim. App. 2007); see also Dobyne v. State, 805 So. 2d 733, 755 (Ala. Crim. App. 2000) (cumulative evidence would not have affected appellant's sentence). Therefore, this Court finds that Miller was not prejudiced by trial counsel's failure to retain a mitigation expert.

Similarly, this Court finds that Miller was not prejudiced by his trial counsels' failure to present more details both of the extent of physical abuse from his father, Ivan, and of the poverty and unstable environment in which Miller lived. Testimony regarding the extensive level of physical and emotional abuse directed towards Miller as well as the extreme level of poverty of Miller's childhood home was presented during trial. (R. 1349-52) Miller has failed to present any further significant and specific facts other than cumulative evidence that simply expounds on general examples of Ivan Miller's abuse and the Miller family poverty. Such cumulative testimony does not demonstrate that Miller was prejudiced by the presentation of testimony concerning the level of abuse and poverty in Miller's childhood. See McNabb, 991 So. 2d at 322; Dobyne, 805 So. 2d at 755.

The record indicates that Miller failed to present any further significant evidence of childhood abuse through the testimony of his family members during the evidentiary hearing. His mother, Barbara Miller, generally testified that Ivan ignored Miller, called him names, and physically abused Miller. (Rule 32 R. 402-11) However, she did not provide testimony of any specific incidents of abuse or injuries as a result of abuse. Miller's sister, Cheryl Ellison provided minimal testimony regarding Ivan's abuse of Miller, admitting she did not grow up in the same house as Miller. (Rule 32 R. 501) Miller's brother Richard also provided nothing but general statements that Ivan would "[s]lap [Miller], kick him, sometimes punch him." (Rule 32 R. 546) Regardless, even if his family could have provided specific facts, simply the fact that Miller's family members could have provided more details of the extent of the abuse Miller suffered or of his childhood poverty does not establish ineffective assistance of counsel. See Payne v. Allen, 539 F.3d 1297, 1317 (11th Cir. 2008) ("The mere fact that the family members could have presented more thorough and graphic detail about the physical abuse Payne

suffered and witnessed and his early substance abuse does not render counsel's performance ineffective.").

Moreover, had counsel presented evidence of Miller's childhood poverty and abuse, it would not have altered the balance of mitigation and aggravation under Strickland. Miller was in his mid-thirties when he committed the murders. (C. 79) It is well established that evidence concerning a middle aged murderer's childhood poverty, abuse and background would have been entitled to little, if any, mitigating weight. See Callahan v. Campbell, 427 F. 3d 897, 937-38 (11th Cir. 2005)(value of evidence regarding childhood abuse "minimal" where defendant was thirty-five when he committed crime); Gilreath v. Head, 234 F. 3d 547, 551 n. 10 (11th Cir. 2000)(petitioner not prejudiced when his attorney failed to present evidence concerning his abusive and difficult childhood where petitioner was forty years old when he committed the offense); Mills v. Singletary, 63 F. 3d 999, 1025 (11th Cir. 1995)(petitioner not denied effective assistance of counsel because counsel failed to present evidence concerning abusive childhood where petitioner twenty-six years old); Bolender v. Singletary, 16 F. 3d 1547, 1561 (11th Cir. 1994)(petitioner

twenty-seven years old when committed offense). Accordingly, this Court finds that Miller has failed to establish prejudice under Strickland.

Miller has also failed to establish that he was prejudiced by his trial counsels' decision not to present additional evidence of Miller's positive character through the testimony of his family members during the penalty phase. Trial counsel was not required to present mitigating character evidence at all during the penalty phase. See Gaddy v. State, 952 So. 2d 1149, 1170-71 (Ala. Crim. App. 2006). However, as noted above, trial counsel did present positive evidence of Miller's life through the testimony of Dr. Scott. (R. 1349-63) The testimony of Miller's family members during the evidentiary hearing was simply cumulative of the positive evidence presented by Dr. Scott during the penalty phase.

Barbara Miller essentially offered no significant, positive details of Miller's character during the evidentiary hearing other than the fact that he helped pay for his younger brother, Ivan Ray's funeral expenses and that he cared for his family and was quiet and hard working. (Rule 32 R. 424) Miller's uncle, George Carr,

provided no noteworthy details of Miller's life and even admitted that he was not around Miller that much as a child. (Rule 32 R. 462) Miller's sister, Cheryl Ellison, gave minimal testimony concerning his positive character, only stating that Miller was like a brother to her son, Jake. (Rule 32 R. 505) Miller's brother, Richard, essentially did not provide any positive character evidence at all during the evidentiary hearing. The positive character evidence presented through the testimony of Miller's family members during the evidentiary hearing was not significant and was merely cumulative to the positive evidence of Miller's life that was presented during the penalty phase. See McNabb, 991 So. 2d at 322; Dobyne, 805 So. 2d at 755.

Miller has also failed to show how he was prejudiced by the failure to present additional mental health evidence during the penalty phase in the form of Dr. Boyer's diagnosis that Miller suffered from post-traumatic stress disorder. (Rule 32 R. 714) Dr. Scott presented testimony that Miller suffered from a mental illness and the trial court found that Miller was under the influence of extreme mental distress and that the capacity to appreciate the

criminality of his conduct was substantially impaired. Miller, 913 So. 2d at 1169. Therefore, the mitigating circumstances pertaining to Miller's mental health were found to exist by the trial court and therefore, the presentation of additional mental health evidence would not have proven any additional statutory mitigating circumstances.

Furthermore, the evidence presented during the evidentiary hearing casts serious doubt on the opinion of Dr. Boyer that Miller suffered from a post-traumatic stress disorder ("PTSD") at the time of the offense. Dr. Boyer stated that the principal sources of information that led her to conclude that Miller suffered from PTSD were that Miller was exposed to routine abuse that Miller routinely zoned out, that Miller had certain elevated MMPI scales, and that Miller had initial difficulty remembering the events of the shootings. (Rule 32 R. 715-16)

On cross-examination, Dr. Boyer agreed that the *Diagnostic and Statistical Manual of Mental Disorders, Forth Edition, Text Revision* (DSM-IV-TR) is an authoritative text in the field of psychiatry, and she explained that the DSM-IV-TR is a guideline for mental

health professionals. (Rule 32 R. 730-31) Dr. Boyer agreed that a diagnosis of PTSD must have an extreme traumatic stressor as opposed to a generic trauma. (Rule 32 R. 733) Specifically, Dr. Boyer noted that with regard to PTSD, the DSM-IV-TR provides, as follows:

> The essential feature of Post Traumatic Stress Disorder is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person.

(Rule 32 R. 733) With regard to "traumas" that are experienced directly, Dr. Boyer noted that the DSM-IV-TR provides, as follows:

> Traumatic events that are experienced directly include, but are not limited to, military combat, violent personal assault (sexual assault, physical attack, robbery, mugging), being kidnapped, being taken hostage, terrorist attack, torture, incarceration as a prisoner of war or in a concentration camp, natural or manmade disasters, severe automobile accidents, or being diagnosed with a life-threatening illness.

(Rule 32 R. 734) See *Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision*, at pp. 463-464.

However, Dr. Boyer noted that Miller had never experienced military combat, a kidnapping, a sexual assault, been taken hostage, been a prisoner of war, or been involved in a terrorist attack, natural disaster or severe automobile accident. (Rule 32 R. 734) Dr. Boyer also noted that Miller had never watched someone be seriously injured or killed, before the shootings took place. (Rule 32 R. 736) Dr. Boyer admitted that none of Miller's hospital records indicated that his injuries came from specific incidents of abuse and did not indicate that Miller ever received any serious gunshot or knife wounds. (Rule 32 R. 740)

Dr. Boyer stated that Dr. McClaren did not find that Miller suffered from a dissociative disorder such as PTSD. (Rule 32 R. 744) Dr. Boyer also noted that no other professional had diagnosed Miller with PTSD. (Rule 32 R. 750) In fact, none of the other four doctors who examined Miller in connection with his trial or evidentiary hearing determined that he suffered from PTSD. Dr. Boyer also failed to provide any specific examples from the testimony presented during the evidentiary hearing of Miller re-experiencing bad experiences. (Rule 32 R. 749-50)

Dr. Harry McClaren testified during the evidentiary hearing that there was no evidence to indicate that Miller was reliving anything at the time of the murders. (Rule 32 R. 787) Dr. McClaren also stated that he originally was of the opinion that Miller's self-report that he had difficulty remembering events of the shootings was of questionable veracity. (Rule 32 R. 775) Dr. McClaren later stated that it was unusual for someone with true amnesia to remember certain events in questions months later. (Rule 32 R. 852) Finally, Dr. McClaren testified that he was of the opinion that Miller was not suffering from PTSD. (Rule 32 R. 787-88) The combination of the lack of a previous diagnosis of PTSD from any mental health professional who examined Miller, Dr. McClaren's opinion that Miller does not suffer from PTSD, and the dissimilarity between the examples of traumatic events contained in the DSM-IV-TR associated with PTSD when compared to the facts presented during the evidentiary hearing regarding Miller's life discredits Dr. Boyer's opinion that Miller suffers from PTSD. Regardless, this Court finds that there is no reasonable probability that the presentation of any evidence regarding Miller's alleged diagnosis of PTSD would

have altered the jury's recommendation of a death sentence or the trial court's finding that the aggravating circumstances outweigh the mitigating circumstances.

Finally, in regards to this entire claim, Miller has not shown a reasonable probability that the result of the penalty phase would have been different had additional mitigation evidence been presented based on the brutal nature of the crime, the overwhelming and convincing evidence of guilt, and the strength of the aggravating circumstance that this murder was heinous, atrocious, and cruel. See Payne, 539 F.3d at 1318. Miller repeatedly and horrifically shot and killed three people. The Court of Criminal Appeals found that the evidence of guilt was "overwhelming", especially in regards to the multiple eyewitnesses identifying Miller as the shooter. Miller, 913 So. 2d at 1162. In this particular case, there is no reasonable probability that additional mitigation testimony about Miller's background or his mental health problems would have altered the balance of aggravating and mitigating circumstances in this case. See Payne, 539 F.3d at 1318 ("Some more detailed mitigating evidence about Payne's childhood, family background, and substance abuse

would not have negated the aggravating nature of this abhorrent murder proven beyond all doubt by the State.") Therefore, Miller has failed to establish that he was prejudiced under Strickland and accordingly, this claim is denied.

3. Miller's Claim That Trial Counsel Failed To Object To Irrelevant Victim Impact Testimony Offered By The States.

In paragraphs 265-67 of his amended petition, Miller claims that his trial counsel were ineffective for failing to object to the testimony of the victims' family members during the penalty phase. Miller claims that this testimony was highly prejudicial and inflamed the jury.

This claim is denied because this Court finds that Miller failed to present any evidence whatsoever during the evidentiary hearing in pursuit of this claim. Miller failed to ask trial counsel a single question regarding why Johnson did not object to the victim impact testimony. During the evidentiary hearing, Miller did not identify any specific testimony from the victims' family members to which Johnson should have objected. Nor did Miller offer any evidence that would establish how he was prejudiced by his trial counsels' decision not to object to this

testimony. Therefore, this Court finds that Miller has abandoned this claim. See Brooks, 929 So. 2d at 498 (holding that a Rule 32 petitioner's failing to ask counsel "any questions concerning her reasons for not pursuing any of the claims" in the Rule 32 petition constitutes an abandonment of those issues). See also Chandler, 218 F.3d at 1314 n. 15 ("An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption [of effective representation]"); Payne, 791 So. 2d at 399 ("Because it appears that Payne did not present evidence at the evidentiary hearing with regard to [Payne's claims], we conclude that he has abandoned these claims and we will not review them.") Accordingly, Miller is not entitled to any relief and this claim is denied.

4. Miller's Claim That Trial Counsel's Penalty Phase Closing Argument Was Deficient And Prejudicial.

In paragraphs 268-72 of his amended petition, Miller claims that his trial counsel were ineffective during closing argument of the penalty phase.

This claim is denied because this Court finds that Miller failed to present any evidence whatsoever during the evidentiary hearing in pursuit of this claim. Miller

failed to ask trial counsel a single question regarding the strategic reasons why Johnson conducted his closing argument in the manner he did. The only question Miller's post-conviction counsel asked Johnson regarding his closing argument during the penalty phase involved verifying that Johnson included the theme in his closing argument that "even the worst of the worst did not deserve to die." (Rule 32 R. 195) However, Miller failed to ask trial counsel why he pursued this strategy. Miller further failed to present any evidence during the evidentiary hearing that established how trial counsel's theme was unreasonable.

Furthermore, Miller did not present any evidence as to what a reasonable attorney would have argued during closing arguments of Miller's trial. Nor did Miller offer any evidence that would establish how he was prejudiced by his trial counsels' closing argument. Therefore, this Court finds that Miller has abandoned this claim. See Brooks, 929 So. 2d at 498 (holding that a Rule 32 petitioner's failing to ask counsel "any questions concerning her reasons for not pursuing any of the claims" in the Rule 32 petition constitutes an abandonment of those issues). See also Chandler, 218 F.3d at 1314 n. 15 ("An ambiguous or silent

record is not sufficient to disprove the strong and continuing presumption [of effective representation]"); Payne, 791 So. 2d at 399 ("Because it appears that Payne did not present evidence at the evidentiary hearing with regard to [Payne's claims], we conclude that he has abandoned these claims and we will not review them.") Accordingly, Miller is not entitled to any relief and this claim is denied.

5. Miller's Claim That Trial Counsel Failed To Request A Special Verdict Form.

In paragraphs 273-74, Miller claims that his trial counsel were ineffective for failing to request that the trial court provide the jury with a special verdict form in order to memorialize the unanimous existence of the aggravating circumstances.

This claim is denied because this Court finds that Miller failed to present any evidence whatsoever during the evidentiary hearing in pursuit of this claim. Miller failed to ask trial counsel a single question regarding why Johnson did not request a special verdict form. Nor did Miller offer any evidence that would establish how he was prejudiced by his trial counsels' decision not to request a special verdict form. Therefore, this Court finds that

Miller has abandoned this claim. See Brooks, 929 So. 2d at 498 (holding that a Rule 32 petitioner's failing to ask counsel "any questions concerning her reasons for not pursuing any of the claims" in the Rule 32 petition constitutes an abandonment of those issues). See also Chandler, 218 F.3d at 1314 n. 15 (same); Payne, 791 So. 2d at 399. Accordingly, Miller is not entitled to any relief and this claim is denied.

6. Miller's Claim That Trial Counsel Failed To Object To The Trial Court's Description Of The Jury's Sentencing Decision As A "Recommendation".

In paragraphs 275-76, Miller claims that his trial counsel were ineffective for not objecting to the trial court's instructions in which the trial court referred to the jury's "recommendation."

This Court denies Miller's claim because he has failed to meet his burden of proof that his trial counsel were deficient for not objecting to the trial court's instructions and has failed to demonstrate how he was prejudiced. Miller's contention is completely without merit. Under Alabama law, the jury's sentencing determination in capital cases is advisory only. Ala. Code § 13A-5-47(a). During the penalty phase instructions, the

trial court properly referred to the jury's determination as a recommendation. (R. 1427, 1428, 1441) Alabama courts have routinely rejected claims that such an instruction is improper. See Harris v. State, CR-04-2363, 2007 WL 4463947 at *20 (Ala. Crim. App. December 21, 2007) ("Alabama courts have repeatedly held that a prosecutor's comments and a trial court's instructions accurately informing a jury that its sentencing verdict is advisory or is a recommendation do not violate Caldwell v. Mississippi, 472 U.S. 320 (1985)"); Brown v. State, CR-04-0293, 2007 WL 1865383, at *46 (Ala. Crim. App. June 29, 2007) (same).

Miller has presented no evidence that the jury in his case was "led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Caldwell, 472 U.S. at 328. To the contrary, the trial court instructed the jury that "[i]t is your sole responsibility to determine what the facts are and recommend the punishment in this case." (R. 1439) Therefore, trial counsel could not be ineffective for failing to make an objection to the trial court's references to the sentencing recommendation of the jury because the trial court's instructions were proper and did

not violate Caldwell. See McNabb v. State, 991 So. 2d 313, 327 (Ala. Crim. App. 2007)("[C]ounsel could not be ineffective for failing to raise a baseless objection.") Accordingly, Miller has failed to meet his burden of proof and his claim is denied.

E. Miller's Claim That Trial Counsel Did Not Investigate Mitigating Circumstances, Prepare Adequately, Or Offer Available Mitigating Evidence At The Sentencing Hearing.

In paragraphs 277-79 of his amended petition, Miller claims that trial counsel were ineffective for failing to offer any additional evidence or witnesses in support of Miller. (Pet. at 83)

This Court denies Miller's claim because he has failed to meet his burden of proof of demonstrating that his trial counsels' performance was deficient under Strickland, 466 U.S. at 687. Ala. R. Crim. P. 32.7(d). Alabama courts have held that "counsel does not necessarily render ineffective assistance simply because he does not present all possible mitigating evidence." McGahee v. State, 885 So. 2d 191, 221 (Ala. Crim. App. 2003). However, as noted above, trial counsel presented a competent mitigating case concerning Miller's mental health and background during the penalty phase of trial. The trial court presided over Miller's

trial and heard all of the mitigating evidence presented. Simply the fact that Miller's trial counsel could have presented more mitigation evidence during the sentencing hearing does not establish deficient performance under Strickland. See McGahee, 885 So. 2d at 222 ("Trial counsel could have called more witnesses at the penalty-phase hearing before the trial judge, with the hope that the additional information would have convinced the trial judge to agree with the jury's recommendation and to sentence McGahee to life imprisonment without parole. The same can be said after any sentencing hearing in a capital case in which a death sentence is imposed after the jury recommended a sentence of life imprisonment without parole.")(emphasis in original).

Miller failed to ask trial counsel any questions regarding the reasons why he did not call any witnesses or present evidence during the sentencing hearing. (Rule 32 R. 200-01) Therefore, trial counsels' performance must be presumed to be reasonable. Furthermore, Miller's trial counsel could not be ineffective for failing to present additional mitigation evidence during the sentencing hearing because "Section 13A-5-47, Ala.Code 1975, does not

provide for the presentation of additional mitigation evidence at sentencing by the trial court." Boyd v. State, 746 So. 2d 364, 398 (Ala. Crim. App. 1999). Therefore, Miller has failed to establish that his trial counsels' performance was deficient and this claim is denied.

This claim is also denied because Miller has failed to meet his burden of proof of demonstrating that he was prejudiced. See Strickland, 466 U.S. at 695; Ala. R. Crim. P. 32.7(d). Miller failed to establish what additional evidence could have been submitted during the sentencing hearing. Miller asked trial counsel whether he submitted Dr. Scott or Dr. McDermott's report during the sentencing hearing before the trial court; however, the substance of both reports had been already presented during the penalty phase. Furthermore, the trial court found three statutory mitigating circumstances to exist. Miller, 913 So. 2d 1169. Miller has failed to demonstrate what additional mitigating circumstances could have been proven during the sentencing hearing. Accordingly, Miller has failed to establish proof that he was prejudiced and this claim is denied.

VII. Miller's Claim That The Cumulative Effect Of All The Above Errors Entitles Him To Relief.

In paragraphs 313-14, Miller claims that his conviction and sentence were unconstitutional and that cumulative errors entitled him to relief. Miller has failed to establish or alleges any facts that support these claims. Miller has not proven the existence on a single error during his trial and appeal; therefore, he cannot be granted relief on cumulative non-error. Accordingly, these claims are dismissed. Ala. R. Crim. P. 32.7(d).

Conclusion

This Court has reviewed each of Petitioner Alan Miller's claims individually and cumulatively and found no error. For the reasons stated above, this Court finds that Miller is due no relief from his capital murder conviction and death sentence.

It is, hereby, ORDERED, ADJUDGED, and DECREED that Miller's amended Rule 32 petition is DENIED. It is further ORDERED that Miller shall have forty-two days from the filing of this Order in the Shelby County Circuit Clerk's Office to file his notice of appeal.

DONE this 5th day of May, 2009.

Honorable G. Daniel Reeves
Circuit Judge

cc. Robin A. Adams, Counsel for Petitioner
Audrey Y. Dupont, Counsel for Petitioner
James S. Whitehead, Counsel for Petitioner
Michael Bartolic, Counsel for Petitioner
William Tran, Counsel for Petitioner
Thomas R. Govan, Jr., Assistant Attorney General

IN THE SUPREME COURT OF ALABAMA

June 22, 2012

1110110 Ex parte Alan Eugene Miller. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Alan Eugene Miller v. State of Alabama) (Shelby Circuit Court: CC-99-792.60; Criminal Appeals : CR-08-1413).

CERTIFICATE OF JUDGMENT

WHEREAS, the appeal in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on June 22, 2012:

Writ Quashed as to ground 1. Deny as to ground 2. No Opinion. Main, J. - Malone, C.J., and Woodall, Stuart, Bolin, Parker, and Shaw, JJ., concur. Murdock, J., dissents. Wise, J., recuses herself.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 22nd day of June, 2012.

Clerk, Supreme Court of Alabama

Resigned 12-17-93 11:00am left w/out proper notice WILL BE IN AROUND 9:00 A.M.

HOLCOMBE
BUILDING SUPPLY

EMPLOYMENT APPLICATION

DATE: 8-6-93

Miller | Alan | Eugene | ___ ___ ___
LAST NAME | FIRST | MIDDLE | SOC. SEC. #

2654 County Rd 67 | 755-6383
STREET ADDRESS | TELEPHONE #

Billingsley | Ala | 36006 | Hass (Pizza Inn)
CITY | STATE | ZIP CODE | WHO REFERRED YOU TO US FOR A JOB?

1/20/65 | 0 | Any
DATE OF BIRTH | # OF DEPENDENTS | WHAT TYPE JOB DO YOU WANT?

Full
PART TIME OR FULL TIME

WHO SHOULD WE NOTIFY IN CASE OF EMERGENCY

Miller | Barbara | mom | 755-6383
LAST NAME | FIRST | RELATIONSHIP | PHONE #

2654 County 67 | Billingsley | Ala | (755-7925 Cher
STREET ADDRESS | CITY | STATE | NEAREST PHONE

none
WHAT SERIOUS ILLNESS, OR OPERATIONS, HAVE YOU HAD IN THE LAST 2 YEARS

5'11 | 275
HEIGHT | WEIGHT

ARE YOU ABLE TO DO WORK WHICH REQUIRES STANDING? Yes LIFTING Yes (YES OR NO

EDUCATION

GRADE SCHOOL ___ | ___ | ___ | yes or GRAD
NAME OF SCHOOL | LOCATION | DATES ATTENDED

HIGH SCHOOL Trinity | Texas | 82-85 | (yes) or GRAD
NAME OF SCHOOL | LOCATION | DATES ATTENDED

COLLEGE OR UNIVERSITY ___ | ___ | ___ | yes or GRAD
NAME OF SCHOOL | LOCATION | DATES ATTENDED

OTHER ___

SCHOLASTIC AVERAGE ___

3690 Highway 25 South • Montevallo, AL 35115 • (205) 665-1281 • Fax: 665-4691 • 1-800-239-7616

20-0001

MILIT....Y SERVICE DATA

WHAT BRANCH OF SERVICE________ LENGTH OF SERVICE(MONTHS)________
DATES OF SERVICE FROM________19___ TO________19___
PRESENT CLASSIFICATION________ PRINCIPAL WORK DUTIES________
MILITARY TRAINING SCHOOLS________
DATE OF SEPARATION________ TYPE OF SEPARATION________
RANK AT SEPARATION DATE________ RESERVE STATUS ACTIVE____ INACTIVE___

HAVE YOU EVER BEEN CONVICTED OF A FELONY? no
NAME OF ANY RELATIVES EMPLOYED BY THIS COMPANY no
RELATIONSHIP________

FORMER EMPLOYERS (BEGINNING WITH THE LAST)

Post Welding Supply 1360 7th Ave No Bham 492- 8-5-93 ~~Seecate~~ Call Dave Alderhold ~~\$~~9/hr for Reference

NAME OF EMPLOYER ADDRESS DATES WORKED SUPERVISER WAGES

Discharged Beadblast and check paint cylinder and On time Good Worker Very seldom was he out sick

REASON FOR LEAVING BRIEF DESCRIPTION OF DUTIES

Custom Finishing 663-5860 Hwy 420 Helena AL Good Employee worked well Richard Pagett 5.7

NAME OF EMPLOYER ADDRESS DATES WORKED 4 others SUPERVISOR WAGES

Laid Off Load Line + painter helper they were slow on work left in good standing

REASON FOR LEAVING BRIEF DESCRIPTION OF DUTIES

BAMA TRUSS Shelby AL. PAT Shugrue 5.5

NAME OF EMPLOYER ADDRESS DATES WORKED SUPERVISOR WAGES

not enough work Assembled trusses No problems Showed up on time Dependable wouldre

REASON FOR LEAVING BRIEF DESCRIPTION OF DUTIES

PERSONAL REFERENCE (849-6541)

NAME Jerry McMurray ADDRESS Robinwood, AL OCCUPATION techinal Servic

NAME Ronnie Connell ADDRESS 1847 Co Rd 450 Clan ton (755-7925) OCCUPATION MANAger-drycle

* COMMENTS worked At CAhaba Lumber + B'ham Lumber

By signing this application, I affirm that all statements herein are TRUE, and misrepresentation of facts will subject me to immediate discharge. I further agree to abide by all company rules and regulations upon becoming an employee of this company, with the understanding that the violation of any of these rules and regulations will subject me to immediate discharge.

I further agree to take a physical examination upon request by the company; by a company approved doctor at company expense.

The age discrimination in Employment Act of 1967 prohibits discrimination on the basis of age with respect to individuals who are at least 40 but less than 70 years of age.

"In connection with your employment application, and investigation into your credit standing, credit capacity, general reputation, character, personal characteristics, or mode of living may be made. Any such investigation, will be in strict compliance with provisions of, the Fair Credit Reporting Act, 15 United States Codes 1601.

If you are denied employment either wholly or partially on the basis of a consumer report from a consumer reporting agency, we will promptly advise you of such adverse action, and will furnish you with name and address of the consumer reporting agency making the report."

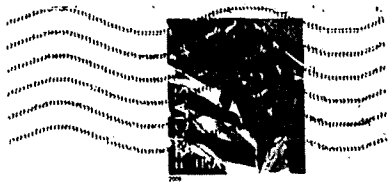
Alan Miller
Signature of Applicant

20-0002

HOLCOMBE
BUILDING SUPPLY

Holcombe Building Supply
3690 Highway 25
M(vallo, AL 35115

BIRMINGHAM AL 352
13 JAN 2006 PM 4 T



Sidley Austin, LLP
555 West 5th St.
Los Angeles, CA 90013

JAN 18 2006
K. SELDON

30013+1010 C051

20-0003

FERGUSON ENTERPRISES, INC.® and its subsidiaries

PAYROLL/PERSONNEL FORM

AFFILIATE BIRMHVAC

PAYROLL USE ONLY
INPUT BY:
INPUT DATE:

Social Security No.	Associate's Name First	Middle I.	Last	Effective Date of Change
	ALAN	E.	MILLER	

Street	City	State	Zip Code
2654 County Road 67	Billingsley	AL	36006

Birth Date	Marital Status	Education *	Sex	Ethnic Class *	Hire/Rehire Date	Credited Service Date	Location No.	Classification
1-20-65	S ☑ M ☐	02	M ☑ F ☐	01	2/15/99		428	TRAINEE ☐ GENERAL ☑

TYPE OF ACTION

Employment	Merit Increase	Promotion	Demotion	Title Adj.	Salary Adj.	Transfer In	Transfer Out	Leave of Absence *	Rehire	STAFFING DATA
	✓									REPLACEMENT ☐ ADDITION TO STAFF ☐

STATUS CHANGE

	Work Location	If Replacement, Name of Former Incumbent	Supervisor's Name
PRESENT	428		DAVID HASENBEIN
PROPOSED			

	Title Date	Job Title	Job Code	Work week hours	(F) F/T (P) P/T	(S) Salary (H) Hourly	(B) BW (M) MO	(E) Exempt (N) Non Exmt.
PRESENT								
PROPOSED								

	Monthly Salary	Hourly Rate	Prepaid Bonus	PP BONUS FREQU B M Q	Annual Salary	GUARANTEE
PRESENT		#10.00				AMT.
PROPOSED		#10.40				YR.

INCREASES			LEAVE OF ABSENCE		TRANSFERS OUT
	Present	Proposed	Leave of Absence Date:	Code *	Location Transferred To
EFFECT. DATE					
INCREASE AMT.	10.00	10.40	FMLA	NON - FMLA	
% INCREASE					

REMARKS (Reason for action, with detail as necessary, to support action)

* ALAN HAS DONE AN EXCELLENT JOB AS DRIVER IN HIS SHORT TIME HE HAS BEEN WITH FEI.

* HE WILL NOT BE ELIGIBLE FOR RAISE IN NOVEMBER.

EFFECTIVE DATE 6/28/99

REVIEW AND APPROVAL		GAINING ORGANIZATIONAL APPROVAL	
Recommended	Date	Recommended	Date
A. Krumalis	6/28/99		
Reviewed	Date	Reviewed	Date
Approved	Date	Approved	Date

*** SEE REVERSE FOR CODES**

AFFILIATES COPY

F141 REV. (1/98)

515a

20-0050

Birmingham News (AL)

CONTRASTS EMERGE OF MAN WHO KILLED THREE

September 14, 1999
Section: NEWS
Page: 01-A

NANCY WILSTACH and JON ANDERSON News staff writers

Alan Eugene Miller had never killed anybody until he drove to work in Pelham last month and started shooting people.

But it wasn't the first or even the second or third time the 34-year-old truck driver was violent or openly angry on the job.

He had been fired from one job for fighting; an altercation at another workplace drew police; and a former supervisor reported a string of shouting matches over five years between **Miller** and one of the three men he killed Aug. 5.

People who knew **Miller** said little about him in the first few days after the shootings, but more have talked in recent weeks.

Two hard-to-reconcile pictures of **Miller** emerge, though the figure in both is a 350-pound man who kept to himself and seldom started a conversation.

Some people recall a hard-working, ordinary man whose demeanor never hinted of his deadly burst of rage. Others, however, remember a man prone to lose his temper, especially when people made fun of him or encroached on what he considered his personal space. **Miller**, Page 4A 1A

Nothing anybody recalls fully explains the fury that claimed the lives of Lee Holdbrooks, Christopher Scott Yancy and Terry Jarvis at the Pelham offices of Ferguson Enterprises and Post Airgas.

That morning, **Miller** drove from his home in Billingsley to Ferguson Enterprises, where he worked. He walked into the office just after 7 a.m. and shot two of his co-workers, Holdbrooks, 32, and Yancy, 28.

He then drove five miles south on U.S. 31 to Post Airgas, where he had worked until January, and shot the assistant manager, 39-year-old Jarvis.

A trial date has not been set for **Miller**, who has pleaded not guilty by reason of mental disease or defect. **Miller**'s lawyers, who don't dispute that he killed the three men, denied a request from The News for an interview with **Miller**.

They described him as "at best, very slow," and said they are awaiting a chemical analysis of blood drawn from him immediately after his arrest. They want to know whether brain chemicals that influence behavior were normal. Work history

Co-workers recalled at least two incidents in which **Miller** behaved violently on the job or argued with people.

Dave Adderhold, who owned Post Welding Supply Co. before selling it to Airgas in 1994, hired **Miller** to work in the company's plant in downtown Birmingham during the early 1990s.

"**Alan** worked good as far as I'm concerned," Adderhold said.

35-0050

But the company fired **Miller** and two other men after they got into a fight on the job. The men had been mocking **Miller**, calling him a redneck and country boy, Adderhold said. "He didn't start it, but he sure finished it up," Adderhold said of the fight. "He took care of both of them."

Later, while **Miller** was working at Holcombe Building Supply in Montevallo, police were called to the store because of a fight involving **Miller**. Police confirmed this, but the store's owner, Van Holcombe, declined to discuss it.

In 1993, **Miller** came back to work for Post as a truck driver and route salesman for the company's Pelham branch. He got along with most employees there but had a sour relationship with Jarvis.

Miller and Jarvis had repeated shouting matches in the five years **Miller** worked there, former store manager Frank Neeley said. Jarvis, as assistant manager, was responsible for making sure deliveries were made and gave **Miller** orders.

"**Alan** would refuse to deliver it," Neeley said. "**Alan** didn't like to take orders from Terry."

Still, Neeley, who rehired **Miller**, described him as "just your average, everyday Joe."

Post Airgas laid **Miller** off last January because of economic cutbacks, said Neeley, who left the company in April.

Within a month or so, **Miller** started driving a truck for the Ferguson Enterprises heating and cooling business in Pelham. It was less than six months before he shot two co-workers.

Chris Nicoletta, operations manager at Ferguson, said, "I don't think anyone here would have anything negative to say about him. He ran his truck route. Never had any problems. Never had complaints. Never called in sick. Never was late."

What triggered the violence remains a mystery. A Post Airgas manager who witnessed the shooting said **Miller** complained of Jarvis' spreading rumors about him just before he shot him. If authorities know what those rumors are, they're not saying. Employees at Post Airgas aren't talking, either.

Chad Ingram, a friend of Holdbrooks, said **Miller** was angry over his truck route assignments at Ferguson, upset that Holdbrooks got better routes. Officials at Ferguson say that's not true.

"**Alan** is not crazy," said David Tinker, former purchasing manager at Post Airgas. "He knew what he was doing, and he knew who he wanted to shoot. There ain't nothing wrong with **Alan Miller**, except he killed three people and he needs to die."

Tinker said **Miller**'s biggest problem was his 350 pounds. "He was just fat," Tinker said. "People just made a lot of fun of him."

Miller sometimes came to Southern Welding Supply, where Tinker now works. One day, he was complaining that people at Ferguson made fun of him because of his size, Tinker said. He said the taunting obviously bothered **Miller**.

Out of touch?

Relatives who have seen **Miller** since his arrest describe him as out of touch with reality. His mother, 59-year-old Barbara **Miller**, said he was concerned about missing his favorite television shows when she visited him recently in jail.

35-0051

Miller was born in Chicago, the middle child of seven, two of whom have died. He had a couple of head injuries from falls as a child and suffered continual headaches, which he treated with Goody's powders, said his mother.

When he was 7, Miller's family moved from Chicago to the Birmingham area. He attended elementary schools in Birmingham's West End, attended Midfield High School and graduated from Trinity High School in Euless, Texas.

"He never brought a girl home and never talked about any girls," Mrs. Miller said. "I heard him tell his brother one time that all women are interested in is money and cars."

After high school, Miller considered joining the military, his mother said, "but they wanted him to lose weight, and he didn't want to lose weight." A short fuse

Miller's parents are divorced. Until he went to jail, he lived with his mother, his brother, his sister and her children in a white, double-wide mobile home on 20 acres in Billingsley. Except for six months in the early 1990s, he lived with his mother his entire life.

Neighbors said they often heard Miller yelling at his family and sometimes at children who came onto his property.

But his cousin, Midfield City Councilman Brian Miller, remembered him as "a gentle giant - very quiet, kept to himself, just as soon stay at home." Miller's days had fallen into a fairly predictable routine before the events of Aug. 5. He got up at 5 a.m., ate breakfast, headed for work. Many mornings, he stopped at Enterprise Grocery for gas and a 7-Up, said the store's former owner, Patricia Cooedy. Miller would answer direct questions, she said, but never initiated conversations - unlike his father, Ivan Miller, who often came in quoting the Bible and predicting doom for sinners.

Like many who knew him, Mrs. Cooedy has puzzled over what happened. "That boy got his feelings hurt real bad and then would sit around and dwell on it, is all I can figure," she said.
News staff writer Bill Plott contributed to this report.

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35-0052